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1460 United States *1454*
Circuit Court of Appeals
For the Ninth Circuit.

CHUN NGIT NGAN,

Plaintiff in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Court of the Territory of Hawaii.

FILED

OCT 10 1925

F. D. MONCKTON,

CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

AMENDED COMPLAINT.

To the Honorable the Judge Presiding in the Above-
entitled Matter:

Plaintiff above named, complaining of defendant
above named, and for cause of action, alleges:

I.

That plaintiff above named, Chun Ngit Ngan, is
the widow of Yuen Tai Kam, who died in Honolulu,
Territory of Hawaii, intestate on the 5th day of
February, A. D. 1923.

II.

That the Prudential Insurance Company of
America is a New Jersey corporation doing a life
insurance business in the Territory of Hawaii
through the Hawaiian Trust Company, Limited, an
Hawaiian corporation, who is its duly constituted
and acting agent.

III.

That on the 1st day of May, A. D. 1922, decedent entered into a certain contract of insurance with defendant wherein and whereby in consideration of certain stated payments to it to be paid by the said Yuen Tai Kam, it agreed to pay to the said plaintiff, herein, upon the death of the said Yuen Tai Kam, in event that the said Yuen Tai Kam should die within [1*] twenty years from the date of the issuance of said policy of insurance the sum of five thousand dollars (\$5,000.00), a copy of said contract being hereto attached marked Exhibit "A," and made a part hereof; that said Yuen Tai Kam died within one year of the date of the issuance of said policy of insurance.

IV.

That notwithstanding that the said Yuen Tai Kam died in Honolulu, Territory of Hawaii, on the 5th day of February, A. D. 1923, and notwithstanding that the said Yuen Tai Kam had paid all sums due under said policy of insurance issued to him as aforesaid, the defendant has failed, refused and neglected to pay the said plaintiff the sum of \$5,000 as it had promised and agreed to do as herein set forth.

V.

That said plaintiff has complied with all the conditions and provisions in said policy of insurance contained and has submitted to said defendant in

*Page-number appearing at foot of page of original certified Transcript of Record.

the manner and form required by it due proof of the death of said Yuen Tai Kam.

WHEREFORE plaintiff prays judgment against the defendant in the sum of \$5,000.00, together with costs, interest and attorneys' commissions and prays that process issue out of this court summoning defendant to appear and answer this complaint at the time and place in said summons set forth.

Dated at Honolulu, T. H., this 8th day of November, A. D. 1923.

CHUN NGIT NGAN,
Plaintiff Above Named.

By THOMPSON, CATHCART & ULRICH,
E. H. BEEBE,
Her Attorneys. [2]

City and County of Honolulu,
Territory of Hawaii,—ss.

George Inn, being first duly sworn, deposes and says: That he is an attorney-in-fact for Chun Ngit Ngan, and makes this affidavit as such attorney in behalf of the said Chun Ngit Ngan; that he has read over the foregoing amended complaint and knows the contents thereof and that the same is true and correct.

GEORGE INN.

Subscribed and sworn to before me this 8th day of November, A. D. 1923.

[Seal] C. S. YUEN,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Due service, by copy of the within amended complaint is hereby admitted.

FREAR, PROSSER, ANDERSON &
MARX,

MFP.,
Attorneys for Defendant.

Honolulu, Hawaii, November 9th, 1923.

[Endorsed]: Filed Nov. 9, 1923, at 25 minutes
past 10 o'clock A. M. [3]

THE PRUDENTIAL

INSURANCE COMPANY OF AMERICA

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amounts named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED YUEN TAI KAM
FACE AMOUNT OF INSURANCE --- FIVE THOUSAND --- Dollars,
payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof, on the first day of May, 19 42, provided the Insured be then living and this Policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this Policy is in force.

PAYABLE TO the Insured, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to CHUI NGIT NGAN, Beneficiary, wife of the Insured.---

ACCIDENTAL DEATH BENEFIT --- FIVE THOUSAND --- Dollars,
payable to the Beneficiary in addition to the Face Amount of Insurance, in event of death by accident as defined in the clause headed "Provisions as to Accidental Death Benefit," on the second page hereof, subject to the provisions therein set forth.

If there be no Beneficiary living at the death of the Insured the amount of insurance payable shall be paid to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

TOTAL AND PERMANENT DISABILITY BENEFITS.

MONTHLY INCOME TEN DOLLARS PER MONTH FOR EACH \$1000 of the Face Amount of Insurance, payable to the Insured in event of total and permanent disability before age 60, subject to the provisions as to Total and Permanent Disability contained in the Policy.

WAIVER OF PREMIUMS in event of Total and Permanent Disability as hereinafter provided.

Annual PREMIUM --- Two hundred Thirty-three and 95/100 --- Dollars,
payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the following due dates, the first day of May ---

in every year during the continuance of this Policy, until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

IN WITNESS WHEREOF, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this first day of May, one thousand nine hundred and twenty-two.



Horace A. Snyder
President

ATTY.

[Signature]

William J. Hamilton
Secretary

Age 28

Twenty-Year Endowment Policy—Annual Dividends. Premiums Payable for Twenty Years. Accidental Death Benefit. Total and Permanent Disability Provision: Monthly Installments Without Deduction from Insurance, Waiver of Premiums.
no 12215-40

FOUNDED BY JOHN F. DRYDEN
PIONEER OF INDUSTRIAL INSURANCE IN AMERICA

Full signature of the person
whose life is to be insured: Yuen Tai Kam

and true, and I agree that the foregoing, together with this application, as well as the application and become a part of the contract of insurance hereby applied for. I declare that the information contained and that UNLESS the full first premium is paid by me at the time required by me and the full first premium thereon is paid, while my health, habits and occupation are such as to entitle me to the insurance, the full first premium is paid, the insurance hereby applied for, provided this application is approved and accepted at the Home Office of insurance applied for.

Acquiring any knowledge or information which he thereby acquired.

Queen Tai Kwan

Dated this 21 day of April, 1982 Yuen Tai Kwan
Applicant's Signature

~~MEDICAL EXAMINER'S CONFIDENTIAL REPORT~~

Cash Surrender Value Under Paid-up Endowment and Paid-up Term Policies.—If this Policy shall lapse, as above, and a Paid-up Endowment Policy be issued or a Paid-up Term Policy be put in force in lieu thereof, such Paid-up Endowment or such Paid-up Term Policy may be surrendered at any time for its full reserve value at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value.

TABLE OF LOAN AND NON-FORFEITURE VALUES.
(Values subject to reduction on account of any outstanding indebtedness as heretofore provided.)

12-26

The Cash Surrender and Loan Values, Paid-up Endowment Policies and Pure Endowment stated in the following table apply to a policy of \$1000, Face Amount of Insurance. As the Face Amount of Insurance under this Policy is \$1000, the Cash Surrender and Loan Value (column 1), the Paid-up Endowment Policy (column 2) or the Pure Endowment (column 3) available in any year will be **FIVE TIMES** the amount stated in the table below for that year.

(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance	(4) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(5) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(6) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance
1 Year	None	None	11 Years	\$428 00	\$575 00
2 Years	\$50 00	\$88 00	12 "	482 00	628 00
3 "	82 00	140 00	13 "	540 00	681 00
4 "	118 00	197 00	14 "	601 00	734 00
5 "	160 00	258 00	15 "	665 00	787 00
6 "	198 00	311 00	16 "	726 00	832 00
7 "	239 00	363 00	17 "	790 00	875 00
8 "	282 00	416 00	18 "	857 00	918 00
9 "	328 00	469 00	19 "	927 00	959 00
10 "	376 00	522 00	20 "	1000 00	Policy Payable

*The tabular loan value at the end of any year, discounted at the rate of six per cent. per annum, shall be available to the Insured at any time after the entire premium for that year has been paid.

The non-forfeiture values in the above table are based upon the American Experience Table of Mortality with three and one-half per cent. interest per annum, and the net value of any such non-forfeiture value, from the second to the end of the fifteenth year, is at least equal to the entire reserve on this Policy, according to the foregoing standard, less a percentage (not more than two and one-half of the Face Amount of Insurance under the Policy; thereafter, such net value is the full reserve by said standard, less a surrender charge, if made, of not more than one-twentieth of one per cent. of the Face Amount of Insurance under the Policy.

If the Face Amount of Insurance be increased by dividend additions the Loan and Cash Surrender Values will be increased by the full reserve on account of such additions and the other non-forfeiture values modified accordingly.

If the premiums of this Policy be paid in quarterly or semi-annual installments, due allowance will be made in computing values from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated; provided, however, that if more than one but less than two full years' premiums shall have been paid an allowance of fifteen days of continued insurance will be made for each quarter of a year for which the premium has been paid.

PROVISIONS AS TO MODES OF SETTLEMENT AT MATURITY.

The Insured may at any time while this Policy is in force, subject to the rights of any assignee and with the power of revocation, by written notice to the Company, designate any one of the following options as the manner in which the amount of insurance shall be payable in full at the death of the Insured, and the Company will then endorse on the Policy that payment shall be made according to the option designated, but if the Insured shall have made no such designation, the Beneficiary shall have the right of designation; provided, however, that in no event shall Option 1 or 2 be available to an individual Beneficiary if the amount of cash installment payable thereunder to such Beneficiary would be less than \$10, nor shall Option 3 be available if the amount of insurance payable be less than \$1,000 and none of said options shall be available if the Beneficiary be a corporation or a firm. If this Policy mature as an Endowment and be payable to the Insured, and if the Insured shall designate one of the following options as the mode of settlement, the provisions of such option shall be construed as applying to the Insured in the same manner as they would have applied to the Beneficiary if the Policy had matured by death.

Option 1. Monthly Installments for Definite Number of Years.—The amount of insurance or a part thereof to be payable in equal monthly installments, each installment of the amount stated for the definite number of years selected, together with dividends, if any, according to the following table:

Number of Years During Which Monthly Installments Are Paid	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of Monthly Installment Per \$1,000 of Insurance	\$42.65	\$28.90	\$22.63	\$17.95	\$15.29	\$13.25	\$11.78	\$10.64	\$9.71	\$9.00	\$8.39	\$7.87	\$7.42	\$7.03	\$6.69	\$6.40	\$6.14	\$5.91	\$5.70	\$5.51	\$5.34	\$5.18	\$5.04	\$4.92

Option 2. Monthly Installments for Definite Number of Years and Continuously Thereafter.—The amount of insurance or a part thereof to be payable in equal monthly installments, each installment of the amount stated for the age of the Beneficiary, at the death of the Insured, together with dividends, if any, and payable during the definite number of years selected, and thereafter so long as the Beneficiary shall live, as specified in the following table:

Amount of Monthly Installment Per \$1,000 of Insurance, Payable During Years Stated and Thereafter During Lifetime of the Beneficiary	Definite Number of Years	Age of Beneficiary When Policy Becomes a Claim																							
		16 and Under	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39
5 Years	\$5.91	\$5.94	\$5.96	\$5.98	\$6.00	\$6.03	\$6.06	\$6.08	\$6.11	\$6.14	\$6.18	\$6.21	\$6.25	\$6.28	\$6.32	\$6.36	\$6.41	\$6.45	\$6.50	\$6.55	\$6.61	\$6.67	\$6.73	\$6.79	\$6.85
10 Years	\$6.87	\$6.89	\$6.91	\$6.93	\$6.95	\$6.98	\$7.00	\$7.03	\$7.06	\$7.09	\$7.12	\$7.15	\$7.19	\$7.22	\$7.26	\$7.30	\$7.34	\$7.38	\$7.43	\$7.48	\$7.53	\$7.59	\$7.65	\$7.71	\$7.77
15 Years	\$7.81	\$7.83	\$7.85	\$7.87	\$7.89	\$7.91	\$7.94	\$7.96	\$7.99	\$8.02	\$8.05	\$8.08	\$8.11	\$8.14	\$8.18	\$8.21	\$8.25	\$8.29	\$8.34	\$8.38	\$8.43	\$8.48	\$8.54	\$8.60	\$8.66
20 Years	\$8.74	\$8.76	\$8.78	\$8.80	\$8.82	\$8.84	\$8.86	\$8.89	\$8.91	\$8.94	\$8.97	\$8.99	\$9.02	\$9.05	\$9.09	\$9.12	\$9.15	\$9.19	\$9.23	\$9.27	\$9.31	\$9.35	\$9.39	\$9.43	\$9.47

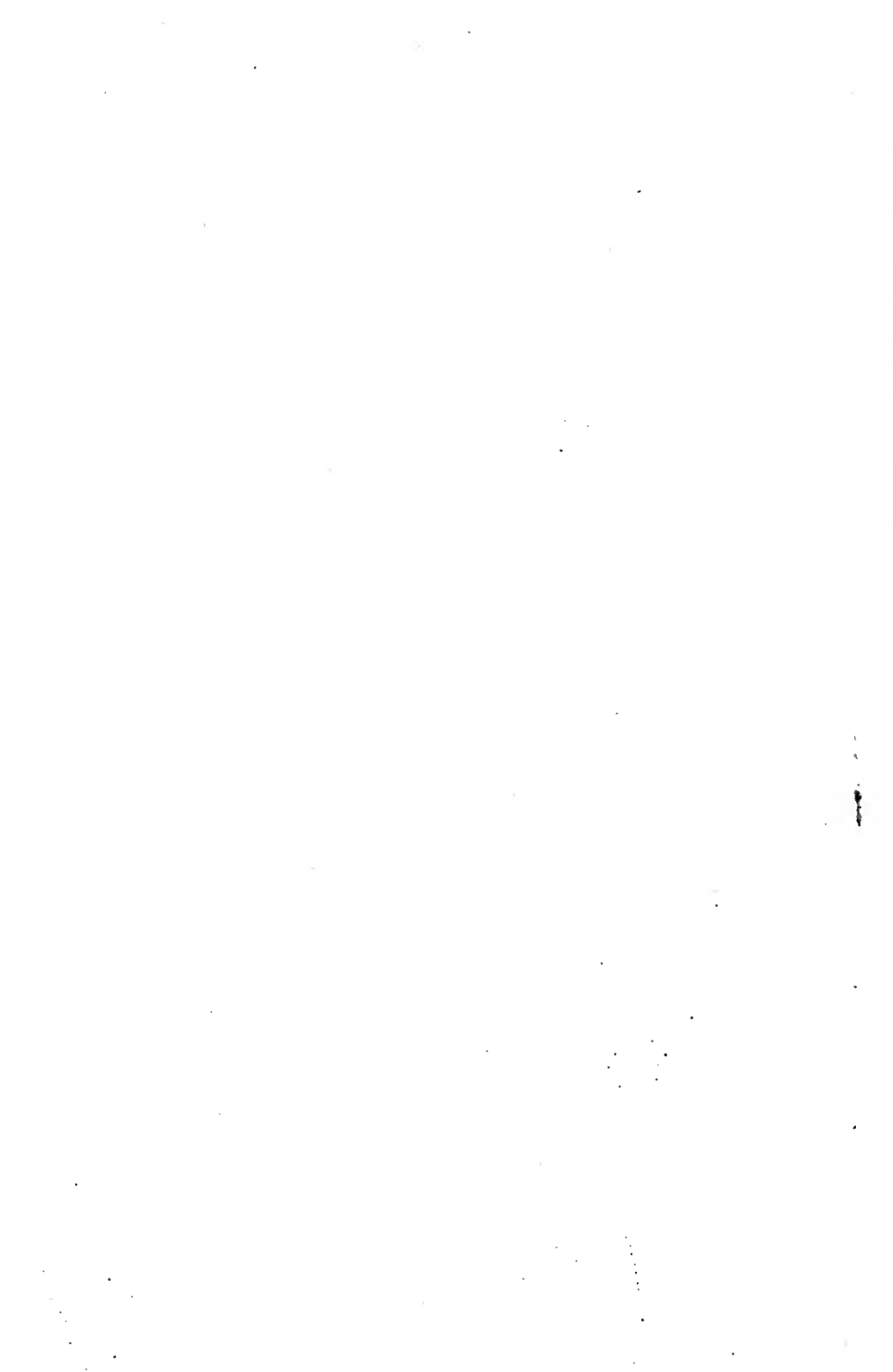
Option 3. Trust Fund.—The amount of insurance or any portion thereof not less than \$1,000 to be left during the lifetime of the Beneficiary in trust with the Company, and the Company will pay thereon, so long as the said amount or said portion thereof remains with the Company, interest at the rate of three and one-half per cent. per annum, together with dividends, if any. The said Trust Fund shall be paid at the death of the Beneficiary to the executors or administrators of the Beneficiary.

Annual, Semi-Annual or Quarterly Installments.—computed at the rate of three and one-half per cent. per annum compound interest, will be paid upon request in lieu of the monthly installments provided under Options 1 and 2, unless the Insured shall have otherwise directed in writing.

Unpaid Installments at Death of Beneficiary.—If one or more installments shall actually be paid in accordance with the provisions above and if the Beneficiary shall die before all installments payable shall have been paid, and if there be no contingent beneficiary designated by the Insured or by the Beneficiary after the death of the Insured, the unpaid installments will be computed at the rate of three and one-half per cent. per annum compound interest and paid in one sum to the executors or administrators of the Beneficiary.

Dividends with Installments or Interest.—If the amount of insurance be payable in installments, monthly or otherwise, or be left in trust with the Company, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will affect an increase in the installments or in the interest payable on account of the trust fund, but no dividend will be declared on installments payable after the period fixed for installments certain.

one 122 (15-4)



[Title of Court and Cause.]

AMENDED ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT.

Now comes the defendant above named by its attorneys, Frear, Prosser, Anderson & Marx, and for answer to the amended complaint heretofore filed herein shows unto this Honorable Court as follows:

I.

Defendant denies the truth of each and every allegation in said complaint contained.

II.

The defendant hereby gives notice to the plaintiff that it intends to rely, among other things, upon the defenses of misrepresentation and fraud by the insured in connection with the procurement of the policy upon which this action is based.

WHEREFORE, defendant prays judgment that said complaint be dismissed with costs to said defendant.

Dated, Honolulu, T. H., January 3, 1924.

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &
MARX,

MFP.,
Its Attorneys.

Due service of the foregoing amended answer is admitted this 3d day of Jan'y, 24.

THOMPSON, CATHCART & BEEBE,
Per E. H. B.

[Endorsed]: Filed Jan. 3, 1924, at 2:30 P. M.
[8]

[Title of Court and Cause.]

DECISION.

This is a suit on an insurance policy issued by the Prudential Insurance Company of America on the 1st day of May, 1922.

The name of the insured was Yuen Tai Kam and the beneficiary is Chun Ngit Nhan, designated in the policy as the wife of the insured.

The amount of the insurance is \$5,000.00. It was admitted at the trial that the insured died on Feb. 5th, 1923; that at the time of his death, all premiums due under the policy of insurance had been paid; that the plaintiff is the beneficiary named in the policy, and that she was the wife of the insured; that due notice of the death of the insured was furnished the defendant under the provisions of the policy; that no court proceedings were taken by the defendant to contest its liability under the policy within one year subsequent to its issuance.

Evidence was introduced by the defendant tending to show that at the time the insured made application for insurance, he made to the examining physician certain false and fraudulent [9] state-

ments concerning his physical condition and the state of his health, and I am of the opinion from this evidence that the insured thus practiced a fraud on the defendant and that if the insured had truthfully stated to the examining physician his physical condition, the defendant would not have issued the policy. The policy of insurance contains the following provision: "This policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the insured be misstated the amount or amounts payable under this policy shall be such as the premium would have purchased at the correct age."

Before the expiration of one year from the date of the policy, and subsequent to the death of the insured, the defendant, thru its agents, called on the beneficiary at her home in Honolulu and tendered to her the full amount of the premiums that had been paid on the policy and demanded its return. The beneficiary declined to accept the premiums tendered to her and declined to surrender the policy.

It is the contention of the defendant that because of the fraud practiced on it by the insured, the policy of insurance was void and that in thus tendering to the beneficiary the premiums that had been paid and demanding a return of the policy, the defendant contested the policy as it had a right to do.

The plaintiff on the other hand contends that the defendant could only have contested the policy, on the ground of fraud, by instituting, within one year from its date, some appropriate legal proceed-

ing challenging its validity and that merely tendering to the beneficiary the premiums that had been paid and demanding a return of the policy were not a contest within the meaning of the law. [10]

The weight of both reason and judicial authority in my opinion support the plaintiff's contention. The defendant having failed to contest the policy of insurance within one year after its date by instituting suit for that purpose is now estopped from questioning its validity. Judgment will therefore be entered for the plaintiff against the defendant in the sum of \$5,000.00 together with 8% interest on that amount.

[Court Seal]

JAS. J. BANKS,
Third Judge.

[Endorsed]: Filed at 10:35 o'clock A. M., May 10, 1924. [11]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

L.—No. 10307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

JUDGMENT.

Pursuant to the decision duly rendered and filed
herein,—

IT IS THE ORDER AND JUDGMENT OF
THIS COURT, that the plaintiff, Chun Ngit Ngan,
do have and recover of the defendant, The Prudential
Insurance Company of America, the sum of Five
Thousand Five Hundred Three and 33/100 Dollars
(\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May,
A. D. 1924.

[Court Seal]

JAS. J. BANKS,

Third Judge of the Circuit Court, First Judicial
Circuit, Territory of Hawaii.

O. K.—FREAR, PROSSER, ANDERSON &
MARX.

P.

[Endorsed]: Filed at 3 o'clock P. M., May 12,
1924. [12]

[Title of Court and Cause.]

EXCEPTION TO DECISION AND JUDGMENT.

Now comes the defendant above named by Frear, Prosser, Anderson & Marx, its attorneys, and hereby excepts to the decision heretofore rendered and filed in the above-entitled cause on the 10th day of May, 1924, and further excepts to the judgment entered in the above-entitled cause in favor of the plaintiff and against the defendant filed herein on the 12th day of May, 1924, on the ground that said decision and judgment are contrary to law, contrary to the evidence and contrary to the weight of evidence in said cause.

Dated, Honolulu, May 13, 1924.

FREAR, PROSSER, ANDERSON &
MARX.

M. F. P.,

Attorneys for Defendant.

The foregoing exception is hereby allowed.

Dated, Honolulu, May 13, 1924.

[Seal]

JAS. J. BANKS,
Circuit Judge, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed May 13, 1924, at 3:30 P. M.
[13]

[Title of Court and Cause.]

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JAMES L. HORNER,
Reporter.

Filed at 11:40 o'clock A. M., June 23, 1924. Sibyl Davis, Clerk.

No. 1556. Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk.

No. 1612. Filed in the Supreme Court, Apr. 14, 1925, at 3:25 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [14]

[Title of Court and Cause.]

TRANSCRIPT OF TESTIMONY.

May 2, 1924.

(The Clerk calls the case.)

Mr. PROSSER.—Ready for the defendant.

The COURT.—What says the plaintiff?

Mr. BEEBE.—We represent the plaintiff, if your

Honor please. This is an action on a life insurance policy.

The COURT.—Are you ready?

Mr. BEEBE.—Yes, if your Honor please.

The COURT.—Now, what is the suit about?

Mr. BEEBE.—The action, if your Honor please, is one by Chun Ngit Ngan, a Chinese woman and a beneficiary in a life insurance policy issued by the Prudential Life Insurance Company of New Jersey. The complaint, which is short and I will read to your Honor, sets forth. (Reads.) [15—1] To this complaint the defendant filed an answer, or an amended answer, as it is termed, denying the truth of every allegation in said complaint contained and giving notice to the plaintiff that they intended to rely, among other things, upon the defense of misrepresentation and fraud by the insured in connection with the procurement of the policy upon which this action is based.

The COURT.—The issuance of the policy is not denied, is it?

Mr. PROSSER.—No, sir.

The COURT.—Is it denied that the premiums were paid?

Mr. PROSSER.—No, sir.

The COURT.—Is it denied that the insured is dead?

Mr. PROSSER.—No, sir.

The COURT.—That is not denied.

Mr. PROSSER.—The only issue in the whole case, if your Honor please, is whether there was a legal contest within the so-called contestable period

of one year. That's the only issue in the case; that is, beside the issue of fraud; of course we contend that, because of fraudulent misrepresentation made by the insured at the time he applied for the policy, the policy was absolutely void, and the proper notice of rescission and tender back of the premiums was made by the company prior to the expiration of a year.

The COURT.—Yes. I assume then—may I assume that the [16—2] plaintiff—that you concede the plaintiff's *prima facie* case?

Mr. PROSSER.—We admit the making of the application, the examination of the insured by the company's surgeon, the issuance of the policy on May 1st, 1922, the payment of premiums by the insured, and his death on the 5th day of February, 1923, and that the plaintiff in this action is the party named in the policy as beneficiary thereunder.

The COURT.—Notice of death?

Mr. PROSSER.—And that notice of claim was filed with the company.

The COURT.—All right, then, I would think that that would make out the plaintiff's—

Mr. BEEBE.—Do you also admit that no action was instituted by the Prudential Life Insurance Company for the purpose of contesting or annulling this policy?

Mr. PROSSER.—We admit on behalf of the defendant that no legal action, that is, no court action, was taken by the defendant during the period of one year after the date of the policy for the pur-

pose of rescinding the policy or otherwise.

The COURT.—I would think, Mr. Beebe, that made out your *prima facie* case?

Mr. BEEBE.—Yes, if your Honor please, if I may be permitted, then, to introduce in evidence the policy—

Mr. PROSSER.—One minute. If your Honor please, there [17—3] is going to be considerable discussion, probably, on questions of law here, and I have some documentary evidence to introduce also, and also the evidence of a tender. We have the testimony of about five doctors in this particular case, and I would ask that they be permitted to go until, say, to-morrow. I don't like to keep those gentlemen here.

The COURT.—All witnesses in this case will return on Monday afternoon at two o'clock.

(Recess.)

Mr. BEEBE.—If your Honor please, Mr. Prosser just advised me that he is willing to admit that Chun Ngit Ngan, the plaintiff here, is the wife of the decedent Yuen Tai Kam.

Mr. PROSSER.—That's correct; we'll admit that. You want to offer the policy?

Mr. BEEBE.—I will then offer the policy in evidence.

Mr. PROSSER.—No objection.

The COURT.—It may be received.

Mr. BEEBE.—Does your Honor wish me to read the policy?

The COURT.—No, not now.

Mr. BEEBE.—That is the plaintiff's case, then, if your Honor please.

The COURT.—Now, I understand, Mr. Prosser, from your statement that your defense is that the policy was procured by the misrepresentation—
[18—4]

Mr. PROSSER.—Briefly, our defense is this: That at the time the insured applied for the policy he was examined by the company's physician and, in reply to questions asked him by the company's physician, made certain material statements, which material statements were untrue, knowingly, and were material, and if those statements had been answered correctly, why the company never would have issued the policy. That within the period of one year the company ascertained the falsity of these statements and shortly after the death of the insured notified the beneficiary under the policy, the plaintiff in this case here, that the company would refuse to pay the policy because of fraud of the insured in the matter of his application, answering questions, etc., tendered back to the beneficiary, the plaintiff in this action, the entire amount of the premiums paid, demanded a return of the policy, and the plaintiff in this case refused to accept the return of the premiums and refused to deliver the policy.

The COURT.—Does the policy—In its terms does the policy become incontestable—?

Mr. PROSSER.—After the period of a year.

The COURT.—After the period of a year.

Mr. PROSSER.—And this rescission and tender

was made within a year.

The COURT.—Mr. Beebe, I understand from counsel's statement that before the expiration of the year from [19—5] the date of the policy that the insurer tendered back the premiums that had been paid on the policy—I understood that to be your statement? (To Mr. Prosser.)

Mr. PROSSER.—That's our statement, yes.

Mr. BEEBE.—No, if your Honor please, we will not admit that.

Mr. PROSSER.—That's an issue of fact, if your Honor please.

We desire to offer the application made by Yuen Tai Kam to the defendant company, dated Honolulu, March 20th, 1922, and signed by Yuen Tai Kam.

Mr. BEEBE.—No objection.

Mr. PROSSER.—Ask it be received as an exhibit and marked Exhibit "A" on behalf of the defendant.

The COURT.—Yes, the clerk will mark it.

(Received in evidence and marked Defendant's Exhibit 1.)

Mr. PROSSER.—We now desire to introduce in evidence declarations made to the medical examiner on the 21st day of April, 1922, signed by Yuen Tai Kam, witnessed by Dr. F. F. Hedemann on the same date. Any objection?

Mr. BEEBE.—No objection.

Mr. PROSSER.—Ask it be marked as an exhibit in its regular order.

(Received in evidence and marked Defendant's Exhibit 2.)

Mr. PROSSER.—Mr. Beebe, are you willing to admit that Dr. Iga Mori is still without the Territory of Hawaii? [20—6]

Mr. BEEBE.—Yes.

Mr. PROSSER.—We now desire to introduce in evidence as an exhibit in this case the stipulation between counsel for the defendant and counsel for the plaintiff relative to the testimony which Dr. Iga Mori would give if present in court, it being admitted that he is not within the Territory of Hawaii.

(Received in evidence and marked Defendant's Exhibit 3.)

Mr. PROSSER.—We now desire to introduce in evidence as an exhibit on behalf of the defendant stipulation of counsel relative to the testimony of Dr. Ed. De Meglio, and request counsel to stipulate that Dr. De Meglio is without the jurisdiction of this court.

Mr. BEEBE.—I will admit.

The COURT.—It may be received.

(Received in evidence and marked Defendant's Exhibit 3.)

TESTIMONY OF GLEN A. McTAGGART, FOR
DEFENDANT.

GLEN A. McTAGGART, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. PROSSER.

Q. You are an employee of the Hawaiian Trust Company, Limited, of Honolulu? A. I am.

Q. And that company is the local agent of the Prudential Insurance Company of America? [21—7] A. Yes, sir.

Q. The defendant in this case? A. Yes.

Q. And was such local agent at the time of the issuance of the policy which is the subject matter of this action? A. It was.

Q. Do you know the plaintiff in this case, Mrs. Chun Ngit Ngan? A. Why, I know her by sight.

Q. And did you know Yuen Tai Kam during his lifetime? A. I did not.

Q. You didn't know the holder of this policy himself? A. No, I did not.

Q. You are the superintendent of the insurance department of the Hawaiian Trust Company, are you not? A. I am.

Q. Now, did you have occasion at any time to call upon the plaintiff in this action, Mrs. Chun Ngit Ngan? A. Yes, I did.

Q. When did you call upon her?

(Testimony of Glen A. McTaggart.)

A. It was on April the 7th, 1923.

Q. How do you locate that as being the date?

A. Why, we had received a cablegram from the home office of the Prudential Insurance Company that the claim was invalid and we should return the—make legal tender of the premium which had been paid to the company by the holder of the policy.
[22—8]

Q. I will show this cablegram, dated April 4th, 1923, and ask you if that's the cablegram to which you have referred?

A. Yes, that's the cablegram.

Mr. PROSSER.—I ask that this be received in evidence as an exhibit on behalf of the defendant in its regular order.

(Received in evidence and marked Defendant's Exhibit 5.)

Q. Now, how long after the receipt of that cablegram was it before you saw the plaintiff in this case?

A. I don't remember exactly what day of the week that was, but I know it was two or three days before I could find her; it was on a Saturday morning that we found her home.

Q. Was it the Saturday after the receipt of that cablegram?

A. It was the Saturday after the receipt of that cablegram.

Q. That would be the 7th of April?

A. 7th of April.

(Testimony of Glen A. McTaggart.)

Q. Where did you see her?

A. In her home, on Riverbank Lane, I believe it is called, off Nuuanu Street.

Q. And who, if anybody, was present at the time? Did you talk with her on that occasion?

A. Yes, I spoke to her, explained the circumstances. [23—9]

Q. And who, if anybody, was present besides yourself on that occasion?

A. Mr. A. R. Lange, who is also an employee of the Hawaiian Trust Company, and Mr. Chun Tai Sun.

Q. And what, if anything, did you say to this plaintiff at that time?

A. We went in to her home and she came out and we asked her if she was the beneficiary under the policy. She said she was; she was Chun Ngit Ngan.

Q. And what did she say?

A. She said she was the wife of Yuen Tai Kam who had died and that she was the beneficiary under the policy, her name being Chun Ngit Ngan; I made that very clear before talking to her; and I then explained to her that we had received a cablegram from the home office of the Prudential Insurance Company, stating that on account of misstatements of facts that he had made to the medical examiner at the time of his examination, that the company would not pay the policy; that they wanted, in accordance with their provisions, to return the premium in full, and that I had it there. I had it in my hands at the time, the amount of the premium,

(Testimony of Glen A. McTaggart.)

and tendered it to her, in United States currency.

Q. And what was the amount of the premium which had been paid? A. \$233.95.

Q. And what was the amount that you tendered to her [24—10] in legal tender of the United States? A. \$233.95.

Q. What, if anything, did she say in answer to your statement relative to the company's repudiating the policy and the tender of the money?

A. In addition to tendering her the premium I also told her that we were ready to pay that and that we wanted the policy back in exchange for the premium; we had to take the policy up; and she said that, no, she wouldn't do that, she wanted to see her lawyer; she would want to fight it out.

Q. You demanded the return of the policy, did you? A. Yes.

Q. Unqualifiedly? A. Unqualifiedly.

Q. You didn't refuse to give her any money unless she delivered the policy?

Mr. BEEBE.—I object to that as leading.

The COURT.—Objection sustained.

Mr. PROSSER.—Q. Well, now, have you stated everything that you said to Mrs. Chun Ngit Ngan and she said to you?

A. Well, I took this—I got this money from our cashier in the office, the amount of the premium; went up there, and I had it in my hand at the time; they were—holding the bills in a fan shape so she could see the whole thing was there, and I also had a receipt, [25—11] written out for her to sign,

(Testimony of Glen A. McTaggart.)

and I said I called for the policy in exchange for the premium which had been paid. She said no, she didn't want to do that. I said, "Well, then, we can't give you the premium."

Q. What, if anything, did she say about accepting the money?

A. No, she didn't want to have anything to do with it; she refused to take the money or sign a receipt for it.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you speak to her in English?

A. I spoke to her in English.

Q. She understood you?

A. She answered me in English and she talked as though she understood me.

Q. You didn't work through an interpreter at all?

A. We had this Chun Tai Sun here and in order to make doubly sure I asked him to explain it to her in Chinese so there would be no question about it.

Q. But the conversation you had was directly to her, not through an interpreter?

A. No, no, the conversation I had with her was directly with her; I might have used a little pidgin English to make sure that she understood, but I talked in English and she answered me in English in the same way.

Mr. BEEBE.—That's all. [26—12]

TESTIMONY OF CHUN TAI SUN, FOR THE
DEFENDANT.

CHUN TAI SUN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. What is your business?

A. At the present time?

Q. Yes.

A. I am operating a cafe on Alakea Street.

Q. And what was your business on or about the 7th day of April, 1923?

A. I was an insurance agent connected with the Hawaiian Trust Company.

Q. Do you know Mrs. Chun Ngit Ngan, the plaintiff in this action? A. I do not.

Q. Have you ever seen her? A. No.

Q. Did you ever go with Mr. McTaggart to call on a Chinese woman?

A. I did call on this woman.

Q. What? A. I did call on this woman.

Q. And where did this call take place?

A. This call took place off—a cottage on Nuuanu Street—that lane, the lane I don't remember.

Q. You understand Chinese thoroughly, do you not? A. I do.

Q. And this woman was a Chinese woman, was she not? [27—13] A. She is.

(Testimony of Chun Tai Sun.)

Q. And did she understand Chinese?

A. She did.

Q. Did you talk to her in Chinese? A. I did.

Q. Did you explain to her what Mr. McTaggart had said with reference to this insurance policy in the Chinese language to her? A. I did.

Q. Now, as a matter of fact, did the woman understand English; did she understand any English so far as you could see? A. That part I don't know.

Q. What, if anything, did you say to her and did she say to you relative to the cancellation by the company of this insurance policy?

A. Well, Mr. McTaggart—after Mr. McTaggart had explained to her in English, then I explained to her in Chinese and I told her that we have received a cablegram from the home office notifying the Hawaiian Trust Company that, on account of the insured making false statements to the medical examiner, that this claim will not be paid, and that now we have come up here to return the premium on that policy, and that we demand that the policy be returned to the Hawaiian Trust Company, and at the same time Mr. McTaggart had the [28—14] money in his hands.

Q. And he offered the money to her?

A. He did offer the money to her.

Q. What did she do?

A. Well, she told me that she doesn't want to return the policy, neither does she want to accept the premium, but she wants to take the whole thing in

(Testimony of Chun Tai Sun.)

full, five thousand dollars, or, if not, she will consult her lawyer.

Cross-examination.

(By Mr. BEEBE.)

Q. You say that Mr. McTaggart had the money in his hand?

A. Yes, sir, he had the money in his hands.

Q. And it was what kind of money?

A. Oh, I saw some currency and also a receipt.

Q. Saw some currency, also a receipt?

A. Yes, sir.

Q. Any silver?

A. That part I didn't see.

Q. You didn't see him hand her any silver at all?

A. No.

Q. When he handed her the money—or offered to hand it to her, how did he do it?

A. He just handed this way, see? (Showing.)

Q. What did he say about a receipt? [29—15]

A. Well, Mr. McTaggart told me to ask her to sign the receipt and take the money, if she did receive the money, and also to return the policy at the same time.

Q. Did Mr. McTaggart use you as interpreter?

A. Yes, sir, he did.

Q. He told you what to tell her, then, did he?

A. Yes, sir.

Q. Did she speak much English?

A. That part I don't know.

Q. You were present, were you?

A. I was there.

(Testimony of Chun Tai Sun.)

Q. How many English words did she say during the entire conversation that took place between the three of you and she? A. I don't know.

Q. Did she say anything other than "yes" or "no" in English? A. I don't remember.

Q. Did she speak any English?

A. She did say a few words all right; she said no, or something like that, see?

Q. She didn't engage in any extended conversation, did she?— A. No.

Q. —in English? A. No. [30—16]

Q. Did she use any sentences in English?

A. No, she did not.

Q. The only word that you recollect her saying is—the only English words that you recollect her saying is "yes" or "no," is that right?

A. "Yes" or "no."

Q. Did Mr. McTaggart say that if she took the money she would have to return the policy?

A. Yes, sir.

Mr. BEEBE.—That's all.

TESTIMONY OF ALFRED R. LANGE, FOR DEFENDANT.

ALFRED R. LANGE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mr. Lange, what is your business or occupa-

(Testimony of Alfred R. Lange.)

tion? A. I am an insurance salesman.

Q. And what was your business on or about the 7th of April, 1923? A. Insurance salesman.

Q. And for what company?

A. For the Hawaiian Trust Company.

Q. And did you have occasion to call upon the plaintiff in this action, Chun Ngit Ngan?

A. I did.

Q. With Mr. McTaggart? A. I did. [31—17]

Q. And where did you go with him to call upon her?

A. We went to Fong Inn's the first time, trying to locate her, and found out that this woman lived up on a lane off Nuuanu Street, and we went up there about—on two occasions, and we found her, home, on the second occasion.

Q. And where was it you had—Did you have an interview with her at that time, or did Mr. McTaggart? A. Mr. McTaggart had the interview.

Q. Where did this interview take place?

A. At this woman's home.

Q. And who else was present besides you and Mr. McTaggart and this other witness that has just testified and the woman?

A. There was another elderly Chinese woman there and a—there was a Chinese boy, that is, a young man; I don't—

Q. Was the Chinese boy to whom you refer in court here?

A. Why, I could't say. He was a young man about twenty years old; I don't remember how he

(Testimony of Alfred R. Lange.)

looked.

Q. Now, on this occasion what, if anything, did Mr. McTaggart say to the plaintiff and what did the plaintiff say to Mr. McTaggart?

A. Well, Mr. McTaggart explained to the woman that the Prudential couldn't pay this claim on account of the false statement that was made to the doctor; that the—and that the company refused to pay the claim; and said [32—18] he was there for the purpose of returning the moneys or premiums that were paid in to the company, and Mr. McTaggart tried to have this woman accept the money for a receipt, and this woman declined to take it.

Q. She wouldn't take the money?

A. She wouldn't take it?

Q. And did Mr. McTaggart demand a return of the policy?

A. Mr. McTaggart—I couldn't swear whether he demanded or not; I am not certain whether he asked for the policy or not. Certain he had the money and wanted a receipt for it.

Q. What kind of money did he have?

A. He had currency.

Q. How did he offer it to her?

A. He had it in his hand; he told her about—"If you take this money and sign the receipt, why the"—that was all there was to it.

Q. And when he offered her the money what if anything did she do?

(Testimony of Alfred R. Lange.)

A. Why, she just said she wouldn't take the money; that she wanted the full amount of the policy or nothing.

Q. Did she say that in English?

A. Yes, she said it in English.

Q. How much—Just repeat the words, so far as you can recollect, that she used.

A. She just said that if she couldn't have the full [33—19] amount, five thousand dollars, that she didn't want—she didn't want to take any of it; that she would go and see a lawyer about it.

Q. That's the substance of what she said?

A. That's the substance of it, yes, sir.

Mr. PROSSER.—That's all.

Cross-examination.

(By Mr. BEEBE.)

Q. By "currency" you mean bills, do you?

A. Yes, greenbacks, yes, sir.

Q. Did he have any silver?

A. Why, if he had it in his hand I couldn't see it; I just saw these bills; he had them end out; he had hold of one end of them, had them spread out. If he had silver in the palm of his hand I couldn't say.

Q. Bills in one hand and a receipt in the other, is that it? A. Yes, sir.

Q. Now, your present impression is that she said that she wouldn't take the money; that she wanted the full five thousand dollars or she would go and see a lawyer? A. Yes, sir.

Q. And she said that in English?

(Testimony of Alfred R. Lange.)

A. She said that in English.

Q. Plain English?

A. Plain English. That is, I deal with the Chinese [34—20] more or less and, to me, she spoke better than the average.

Q. She spoke good English, then?

A. Fairly good English, yes, sir.

Q. Did she use any pidgin-English at all?

A. Well, I couldn't say whether she used any—certain words; if she used any I couldn't say.

Q. But she did use more English than “yes” or “no,” is that right? A. Yes, sir.

Q. And you say there was an old Chinese man there? A. No, a lady, an elderly Chinese lady.

Q. And a boy?

A. Young man about around twenty, I should say.

Q. How did you know that the Chinese woman that you were addressing was Chun Ngit Ngan?

A. Just through the inquiries that Mr. McTaggart had with those people in the house there.

Q. You were present, were you, all the time—

A. Yes, I was.

Q. —when Mr. McTaggart made the inquiry?

A. We went in together.

Q. I see.

Mr. BEEBE.—That's all.

Mr. PROSSER.—All that remains of our case to present is the testimony of the physicians to which I have [35—21] referred here before. I will ask that the matter go over to Monday afternoon.

The COURT.—That's agreeable, is it?

Mr. BEEBE.—Yes, that's agreeable.

The COURT.—The matter will be continued until Monday afternoon at two o'clock.

May 5, 1924, 2 P. M.

Mr. PROSSER.—Counsel has asked us to stipulate as to the date of the filing of proofs of death in this particular case. We haven't got in our possession at this time the document which would give that exact date, but we are willing to furnish it and will consent that such date as we give may go in as part of defendant's case.

TESTIMONY OF GLEN A. McTAGGART, FOR
DEFENDANT (RECALLED).

GLEN A. McTAGGART, a witness recalled on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mr. McTaggart, in your testimony of Friday afternoon, in response to a question propounded on your direct examination, you made the following statement: "Well then, we can't give you the premium." Now do you desire to correct that in any way?

A. Yes, I do. I remember as soon as we left the courtroom [36—22] that afternoon that you called my attention to that statement that I had made, and I denied it to you at that time and I told

(Testimony of Glen A. McTaggart.)

you that that was incorrect; that it was more in the form of a question; that is, “we can’t give you the money? You won’t accept the money”—as more of a *résumé* after having made—

The COURT.—Q. Well, what *did* you say?

The COURT.—Q. Well, what did you say?

A. Well, I said to her, “Well, then, you won’t take the money.” You see, I had offered her the premium first in English; then this Chinese boy had talked to her in Chinese and using a certain number of English words with it; I could tell when he got to the part about offering the premium returned to her, and at that particular time I also offered the premium, and further, and again, after he had got all through with the Chinese, I offered it to her again in English. Then, after all that, she said no, I said, “Well, then, you refuse to accept the premium.”

Mr. PROSSER.—Q. In other words, all this needs to be corrected, then, is a question-mark after that instead of a period?

A. Yes, “We can’t give you the money?” That is, “We can’t”—“You won’t accept the money,” is what I said to her.

Q. And what, if anything, did she say to you when you said that?

A. She says, “I won’t take the money.”

Q. Did she make any motion of any kind? [37—23]

A. Well, at the time that I offered her the money on those three occasions she like kind of backed

(Testimony of Glen A. McTaggart.)

away, kind of folded her arms, as much as to say she didn't want to have anything to do with it.

Q. Now, where did that money that you offered her come from?

A. Came from the Hawaiian Trust Company.

Q. And is that money which belongs to the Prudential Insurance Company of America?

A. It was.

Q. And is that a fund which was kept there to their credit at all times?

A. Yes, they have a credit there at all times.

Q. And what did you do with that money when you brought it back?

A. I returned it to the same account that it came from.

Q. To the same fund? A. Yes.

Q. And it has always been there ready for her, ever since? A. Yes, always been there.

Mr. PROSSER.—I think that's all.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you tell this Chinese woman Chun Ngit Ngan, at the time you offered her this money, [38—24] if she didn't take it it would always be in the coffers of the Hawaiian Trust Company for her? A. No, I don't believe I did.

Q. Didn't mention it at all to her, as a matter of fact?

A. No, not there. She came down to my office again, down at the offices of the trust company,

(Testimony of Glen A. McTaggart.)

sometime just before the—she said she was leaving for China, accompanied by a young man at that time, and at that time again I offered her the premium. I didn't make the legal tender because I didn't have it with me; it was over in the cashier's cage.

Q. As a matter of fact, on this second occasion all that you said to her was, "We'll give you this money"?

A. I says, "Wait a moment; I will go and get the money." She said no, she didn't want to.

Q. You said, "Wait a minute, I will go and get you the money"?

A. Yes.

Q. Who was with her?

A. There was a rather tall young Chinese fellow there; I don't know what his name was.

Q. Is that the boy (indicating a person in the courtroom)?

A. I couldn't tell you exactly. It may be.

Q. But there was a boy?

A. There was a rather tall boy, about his build.

Q. That seems to be the man?

A. I think so. [39—25]

Q. On that occasion you didn't tell her that the money was in the safe there and was available at any time for her, did you.

A. No.

Q. What has happened between now and—or between this time and the occasion of your last testifying that has caused you to make this change? Did Mr. Prosser make the suggestion to you, or did you make the suggestion to Mr. Prosser?

A. No, I explained to Mr. Prosser when he was

(Testimony of Glen A. McTaggart.)

here; when we left the courtroom he called my attention to the fact that he had understood me to testify that way, and I denied it, and he says, "Well, I'll get a transcript of the testimony." As soon as he got that, why I could see there was a possibility of there—of a wrong construction being put on it.

Q. Did you tell her at that time that you had to have a receipt for this money?

A. No, no mention was made of a receipt. I had a receipt with me.

Q. Then you want to change all your testimony about asking of her a receipt?

A. No, I made no statement regarding receipt.

Q. You made no statement?

A. I said in that—

Q. Just a minute. You made no statement relative to demanding a receipt from her, in your original testimony? [40—26]

A. I said that she had refused to sign a receipt.

Q. Well, then, you did, then, ask her to sign a receipt?

A. Yes, I must have asked her to sign a receipt, but it wasn't the—

Q. Never mind; just answer my question.

A. All right.

Q. And you also did demand a return of the policy? A. I asked her for the policy.

Q. But you want the Court to believe now that you didn't make the giving of a receipt or a de-

(Testimony of Glen A. McTaggart.)

mand for her return of the policy contingent upon her accepting the money?

A. Oh, no, no; that wasn't contingent on her accepting the money at all.

Mr. BEEBE.—That's all.

Redirect Examination.

(By Mr. PROSSER.)

Q. When you—On this second occasion when you told her you would go for the money what did she say?

A. She said no, she didn't want me to go; wouldn't wait; they got up and started out in company.

Mr. PROSSER.—That's all. [41—27]

TESTIMONY OF DR. F. F. HEDEMANN, FOR DEFENDANT.

Dr. F. F. HEDEMANN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician and surgeon, duly licensed to practice in Honolulu?

A. Yes, sir.

Q. Territory of Hawaii. A. Yes, sir.

Q. And of what institutes of learning are you a graduate?

A. Harvard University and Columbia University.

Q. You mean the Columbia Medical school?

(Testimony of Dr. F. F. Hedemann)

A. Columbia Medical, yes.

Q. College of Physicians and Surgeons?

A. College of Physicians and Surgeons.

Q. How long have you been practicing in the city and county of Honolulu, Territory of Hawaii?

A. Since 1909.

Q. In the month of April and on, to wit, April 21st, 1922, did you occupy any position in so far as the Prudential Life Insurance Company of America is concerned?

A. I was one of their examiners.

Q. And by that you mean one of their medical examiners? A. Medical examiners.

Q. I will ask you if, on that date, one Yuen Tai Kam, [42—28] Chinese, came to you to be examined for a policy in the Prudential insurance company? A. He did.

Q. I show this document, referred to as declarations made to the medical examiner, and ask you if that's your signature attached to that document?

A. It is.

Q. I will call your attention to all of the writing on that document with the exception of the signature of Yuen Tai Kam and ask you if that's in your handwriting? A. Yes, sir, all mine.

Q. Now, Doctor, this signature M. M. M., "Yuen Tai Kam," was that placed on there in your presence?

A. All signatures are in my presence. All applicants sign in my presence.

Q. Now, I see that you, under this document here,

(Testimony of Dr. F. F. Hedemann)

are required to ask the proposed insured certain questions. Did you propound those questions to the insured? A. All questions were propounded.

Q. And did he answer those questions?

A. All answered.

Q. And did you in every case put down his answer there in your own handwriting at the time that he made the answer? A. Those are his answers.

Q. Now, in answer to question number eight, to wit, [43—29] “Are you now in good health?”, did he respond “Yes” as indicated by your handwriting? A. He must have, yes, sir.

Q. In response to question number nine, “On what dates and for what complaints have you been attended by a physician during the past 3 years?” I will ask you if he responded to that question with the word, “None.”

A. Yes, or words to that effect.

Q. I believe you placed the “None” there; that is in your handwriting? A. In my handwriting.

Q. And referring to the different questions contained in question number ten, did you propound each and every one of those questions to the insured? A. All questions were propounded.

Q. And in answer to each one of them he gave the answer “No,” as indicated by—in your handwriting? A. He did.

Q. Now, relative to the question in regard to spitting of blood, he answered “No” to that, did he?

A. He answered “No.”

Q. Now, Doctor, how long have you been acting

(Testimony of Dr. F. F. Hedemann)

as the medical examiner for this insurance company? A. I think it is five years. [44—30]

Q. And have you acted as medical examiner for other insurance companies? A. Two others.

Q. Now, take this particular question as to spitting of blood, supposing that the insured—or the party seeking insurance, instead of answering “No” as indicated by this report here, had answered “Yes,” what significance would that have had in your mind?

A. Well, very important significance. It would mean that probably there was some trouble there which had to be investigated.

Q. Now, I see by this report that, as the result of your physical examination and as the result of his answers to these various questions, you reported him as first-class—

Mr. BEEBE.—I object to that as assuming a state of facts not in evidence.

(Question withdrawn.)

Mr. PROSSER.—Q. I see by this report, Doctor, that you reported this risk as first-class?

A. I did.

Q. Now, upon what was that report of yours based?

A. Based on his answers to me and my findings in examination.

Q. His answers to you as indicated by this particular report? A. Yes, on the report. [45—31]

Q. Now, if, as a matter of fact, when you had propounded to him the question No. 9, “On what dates

(Testimony of Dr. F. F. Hedemann)

and for what complaints have you been attended by a physician during the past 3 years?" he told you that he had been attended by four or five different physicians, and that he had been afflicted with spitting of blood, would you have passed him as first-class? A. No.

Q. Would you have passed him at all?

A. I would give him the lowest rating that I could give him. The company allows the ratings of first-class, average, and poor, but if you give anything but first-class you have got to give reasons on the examination sheet.

Q. But when you pass a man as first-class, then what happens?

A. You don't have to give any explanation on it.

Q. Doctor, it is stipulated between the parties hereto that Dr. De Meglio, of Oklahoma City, would testify as follows: That he knew the deceased, Yuen Tai Kam, and he was under his professional care for a few weeks prior to December 7th, 1921. At that time the said Yuen Tai Kam suffered periodical hemorrhages from his buccal cavity, which he and several doctors attributed to be from his lungs. Any pulmonary bleeding is a symptom of advanced tuberculosis and is always accompanied by a severe cough. I found no cough present, [46—32] so, by means of a long laryngeal applicator, took some smear from his bronchus and had it examined, also took some of the blood. Both showed no tuberculosis whatever, only a mixed infection, mostly streptococci. After a thorough examination of his naso-

(Testimony of Dr. F. F. Hedemann)

pharynx, found the bleeding-point on the posterior end of the lower turbinate consisting of an ulcer over a varicose blood-vessel. The blood examination showed him to be slightly hemophilic and the nasal infection to be from his right frontal sinus. I removed the middle turbinate, to provide free drainage, and injected subcutaneously over his chest 10 cc"—what does that "cc" mean, Doctor?

A. Cubic centimeters.

Q. "10 cc of thromboplastin every day, four times. All the bleeding has stopped so far. If he should show any trace of it again, would advise you to give him elixir chlorocalcium with ergotol combined, four times daily. Otherwise I would like you to give him hypodermically on his return, the Galen-tonic which I send, every other day, alternating No. 1 and 28. After that, let him take the Bland mass pills I send until used up. I would appreciate greatly to hear from you in regard to his case, from time to time, and remain yours fraternally. That said Dr. De Meglio is a physician legally qualified to practice his profession within the State of Oklahoma and that the foregoing [47—33] statement was contained in a letter by him directed to Dr. Chang of Honolulu, which said letter was dated December 7th, 1921.

And the further stipulated evidence of Dr. Mori—
You know Dr. Mori, do you not?

A. Yes, personal friend of mine.

Q. He is a practicing physician—?

A. He was; I think he's away now.

(Testimony of Dr. F. F. Hedemann)

Q. But was he a physician of good standing in the profession?

A. Yes, among the best of the Japanese.

Q. It stipulated that Dr. Mori, if present, would testify as follows: That he is a physician, duly licensed to practice in the Territory of Hawaii and that, as such licensed physician, he treated Mr. Yuen Tai Kam, a Chinese merchant, for neurasthenia and hemoptysis (spitting of blood); from January 21st, 1922, to May 22d, 1922, and that prior to said dates the said Yuen Tai Kam had been going to said Iga Mori for treatment for several years.

Now, if, in addition to that, you knew that he had consulted Dr. Chang, and Dr. Arnold of the Clinic, and Dr. Schnack, relative to his physical condition, before he came to you, would you have passed him?

A. Not a chance.

Q. And would the company have accepted such a risk? [48—34] A. I doubt it.

Mr. BEEBE.—I object to that.

The COURT.—I think that's a conclusion.

Mr. PROSSER.—Q. Have you ever had any experience with the company in cases where you have reported a risk as poor?

A. Whether or not they accepted it in spite of that?

Q. Yes.

A. I don't know; you will have to ask Mr. McTaggart.

Q. I mean have you personally?

A. No, I have not had.

(Testimony of Dr. F. F. Hedemann)

Q. Have you ever known them to do it?

A. No, I—

Mr. BEEBE.—I object to that as leading.

The COURT.—Objection sustained.

The WITNESS.—It's out of my domain—perhaps I don't understand you—

Mr. PROSSER.—Q. Doctor, in any case where you have reported an applicant for insurance as poor— A. Yes.

Q. —has the company granted insurance?

Mr. BEEBE.—I object to that question upon the ground there's no showing that he did—

A. I don't know that they have, no; personally I don't know of any case. They have often come back to me and written letters to me and asked me to go further into [49—35] the case; but what the ultimate result was I don't know, any of them.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you know this man Yuen Tai Kam?

A. No.

Q. All you know was that he came to your office?

A. I have no recollection of the man whatever; never known him.

Q. You have no personal recollection now what he looks like?

A. None whatever. I didn't know he was dead, even.

Q. Now, you say that you put each and every one of these questions to Yuen Tai Kam?

(Testimony of Dr. F. F. Hedemann)

A. I put them to all applicants.

Q. Then you based your answer upon your general custom, not upon your present knowledge of this particular case?

A. I can't, because I can't remember the man. All questions were put to all applicants.

Q. Now, is it possible, Doctor, that Yuen Tai Kam, in answer to question eight, when you said "Are you in good health?" he said, "So far as I know?"

A. Quite impossible for me to say. I got the impression that he said—used the word "Yes."

Q. Possible that he might have said, "As far as I know"? A. He might have; I don't know.

Q. And in answer to various other questions, whether or [50—36] not he had consumption or things of that nature, it's possible that he might have said to you, "So far as I know I have not"?

A. I don't know about that, because if he did there would be an element of doubt in my mind and I would have to go into it in greater detail.

Q. Then would you say that in every case where a person says, "So far as I know, no" you make tests of them?

A. I ask them further what their—"What do you know? and why are you not sure?"

Q. Well, the particular question, where a question says, "Have you had syphilis?" and he says, "So far as I know, no," do you make the blood test?

A. No, the company does not require that. I have to ask the symptoms, see if he has had any of

(Testimony of Dr. F. F. Hedemann)

the symptoms that were suggestive of that disease.

Q. Then, in answer to this question whether or not he had ever had syphilis, it is a possibility that he might have said, "So far as I know, no," isn't that true? A. Possible, I suppose.

Q. And that's also true of consumption,—"so far as I know, no"?

A. Well, he gave me pretty—To write it down "no" he gave me the impression it was no.

Q. But he might have said, "So far as I know, no?"

A. He might have; I don't know what he might have done; I can't remember. [51—37]

Q. Hundreds of people walk the streets without knowledge that they have consumption? that's true?

A. Perfectly.

Q. You, of course, made a physical examination of him? A. Absolutely.

Q. The mere fact that he gave answers to questions didn't preclude you from checking him up or making some physical examination?

A. Everything on that paper has been gone over by me.

Q. And so from your physical examination made at that time you conceived that his answers were correct?

A. I didn't figure one way or the other. I took it for granted they must be correct. I couldn't find any physical signs, so I passed him first-class, because of the answers and my findings.

Q. He showed no physical signs of tuberculosis?

(Testimony of Dr. F. F. Hedemann)

A. Certainly did not. I couldn't hear them if they were. I would have made a notation of those, not passed him as first-class.

Q. You used the same instruments on him, did you not, Doctor, that you did on me when you examined me? A. Yes.

Q. That is, you sounded him and— A. Yes.

Q. And used that ear instrument,—what do you term it? A. Stethoscope.

Q. And by using the stethoscope, Doctor, what do you [52—38] determine,—whether or not his hear is good, and lungs?

A. Yes, the condition of the heart; his heart sounds and lung sounds,—whether you hear anything wrong.

Q. And by your use of the stethoscope did you not determine then that his answers as regards consumption and heart were all right?

A. Sounded all right to me.

Q. What does the presence of streptococci in the human body indicate?

A. Well, that's a pretty big question. May indicate several things. May lie there dormant, or may be in the active stage and cause an active infection.

Q. Anyone might have streptococci?

A. I suppose I might have some in my body, but I hope not.

Q. Every normal individual might have them and still be in good health?

A. I don't know about that. Streptococcus is a pretty strenuous "bug" to have.

(Testimony of Dr. F. F. Hedemann)

The COURT.—Q. What is it?

A. It is one of the bacteria; a germ.

Q. Located in the mouth?

A. No, not necessarily in the mouth. Nasal passages—of any part of the body.

Mr. PROSSER.—Q. Would you say that anyone who had streptococci in his system was a good risk?
[53—39]

A. Well, I can't say. (Laughs.) That's a question pretty hard to put to me. I don't believe I can answer that intelligently.

Mr. BEEBE.—Q. A healthy person may have them and still be perfectly healthy?

A. I suppose might have one or two. I don't know; I can't—Nobody could answer that question. Perhaps Dr. Arnold later on can help you.

Mr. BEEBE.—I think that's all, Doctor.

Mr. PROSSER.—That's all, Doctor.

TESTIMONY OF DR. WAH KAI CHANG, FOR DEFENDANT.

DR. WAH KAI CHANG, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a duly licensed physician in the City and County of Honolulu, Territory of Hawaii? A. Yes, sir.

(Testimony of Dr. Wah Kai Chang.)

Q. And of what medical schools are you a graduate? A. Rush Medical, Chicago.

Q. How long have you been practicing medicine in Honolulu? A. Three years.

Q. I will ask you if you know the subject of this picture here, who is here referred to as Yuen Tai Kam? A. Yes, I do.

Q. And did you know him in or about the month of April [54—40] 1922? A. Yes.

Q. You had known him a long time?

A. I knew him a long time.

Q. Did he have any name other than Yuen Tai Kam? A. V. C. Inn.

Q. Now, do you remember receiving a letter from Dr. De Meglio? A. I did.

Q. Relative to Yuen Tai Kam? A. Yes.

Q. I will ask you if that's the letter which has been referred to and which has heretofore been placed in evidence as an exhibit? A. Yes.

Q. You heard this—You heard me read this letter, did you not, a minute ago? A. Yes.

Q. And that's a true statement of the letter which— A. Yes.

Q. —you received from Dr. De Meglio?

A. No, I received it from Yuen Tai Kam; he brought it to me.

Q. He brought it to you himself?

A. Himself.

Q. And then he consulted you in regard to his troubles? [55—41]

MR. BEEBE.—Might I suggest, if your Honor

(Testimony of Dr. Wah Kai Chang.)

please, that he don't lead the witness.

(Question withdrawn.)

Mr. PROSSER.—Q. Now, after Yuen Tai Kam had brought you that letter what if anything, did you do for him or did he ask you to do for him?

A. I referred him to Dr. Clarke.

Q. Dr. Clarke? A. Yes, sir.

Q. And do you know whether or not he went to see Dr. Clarke? A. Yes.

The COURT.—Q. Of your own knowledge?

A. No, I don't.

Mr. PROSSER.—Q. Did he make any statement to you?

A. He said he was going to see Dr. Clarke.

Q. That's all you know about it? A. Yes.

Q. Did you examine him physically in any way?

A. I never did.

Q. And that's all you know about that?

A. Yes, sir, that's all I know about him.

Q. And what was this other name that you gave?

A. V. C. Inn.

Q. Did he make any statement to you relative to his physical condition?

A. Well, he complained of having bleeding from the nose [56—42] on and off for the past five or six months at the time that he came to see me.

Q. And anything else?

A. That's all. Cough occasionally. He complained of an itching because of the blood, trickles down his throat from the nose.

Q. And when was this, Doctor?

(Testimony of Dr. Wah Kai Chang.)

A. I don't remember whether it was before or after he went away to the States.

Q. Well, it was—He brought that letter from Dr. De Meglio? A. Yes.

Q. So it was after that?

A. I was attending his wife for the past—long before he went away, on maternity case.

Q. Of course you saw him before he went to see Dr. Clarke?

A. Yes. No, I don't know what time he went to see Dr. Clarke.

Q. But you saw him before that? A. Oh, yes.

Cross-examination.

(By Mr. BEEBE.)

Q. Has all of your active practice been down here in Honolulu? A. Beg pardon? [57—43]

Q. All of your active practice has been here in Honolulu? A. Yes, in Honolulu.

Q. You have just been practicing three years?

A. Three years.

Mr. BEEBE.—That's all.

TESTIMONY OF DR. HOWARD CLARKE, FOR DEFENDANT.

DR. HOWARD CLARKE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Dr. Howard Clarke.)

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician in Honolulu? A. I am.

Q. And have been for some time?

A. Since 1920, if I recollect.

Q. And of what college or university are you a graduate?

A. Medical department of Tulane University of Louisiana.

Q. How many years have you been practicing medicine? A. Since 1903.

Q. Now I will ask you if you have had occasion to examine the physical condition of one Y. C. Inn during the year 1922? A. Not under that name.

Q. V. C. Inn? A. Yes.

Q. V. C. Inn. A. Yes. [58—44]

Q. I will show this picture and ask you if you recognize it? A. I do. I have seen it before.

Q. Can you state when you had occasion to examine into the physical condition of the party named? A. January, 1922.

Q. And was anybody with you at the time you made that examination?

A. You mean by way of a physician?

Q. Yes, by way of a physician.

A. To the best of my recollection on that date Dr. Chang brought this patient to me for examination of his nose and throat.

Q. And you made such an examination?

(Testimony of Dr. Howard Clarke.)

A. I did.

Q. And what were your findings as a result of that examination?

A. The man complained of bleeding from his—back of his throat, with a history of having been operated on a month previously in the States. My findings were scars along the turbinate bone from the operation, which had entirely healed. The man was pale, anemic, and an examination of his larynx showed a condition highly suspicious of tuberculosis. I found below the vocal cords evidences of blood, which undoubtedly came from below rather than from above the vocal cords down. I had an X-ray taken of his head and made the statement [59—45] that I felt tuberculosis would be found in his lungs and recommended a lung examination by Dr. Arnold. Anything more?

Q. Did you see any X-rays of his lungs?

A. Yes.

Q. What do they indicate?

Mr. BEEBE.—Just a minute. The X-rays are the best evidence of what they indicate.

The COURT.—Probably. I don't know what the rule would be about that exactly. If it is like a writing, of course or photograph—Have you the X-ray?

Mr. PROSSER.—No, we have not. We have looked for it and cannot find it.

The COURT.—Have you got those X-rays, Doctor?

A. I have not. The X-rays are at the Clinic.

(Testimony of Dr. Howard Clarke.)

Q. And can you produce them?

A. They belong more to Dr. Arnold's department than to mine, but I think he can produce them.

Mr. PROSSER.—Subject to our producing them, may he go ahead and testify, Mr. Beebe?

Mr. BEEBE.—Yes, I am perfectly willing. I will ask that they be produced so that we can submit them to other physicians.

The COURT.—You get them, Doctor, please.

Mr. PROSSER.—Q. And what does an examination of these X-rays to which you have referred indicate? [60—46]

A. I don't feel qualified to pass judgment on the X-ray findings, because that branch of work belongs more to Dr. Arnold; he is better able to answer you this, because I take the head, with the neck, but in this case I had suspicions that the man had tuberculosis and recommended another man to listen to his chest.

Q. Now you have acted, have you not, as medical examiner for insurance companies?

A. Yes, on occasions.

Q. On occasions. From what you know of this particular case would you have passed this man as a subject for insurance?

A. I would like to evade that question, in a way, because I wasn't looking at the man as an insurance risk; I was passing only on the man from the neck up, as to where the bleeding came from and the cause of that condition.

Q. And your finding was what, as to where the

(Testimony of Dr. Howard Clarke.)

bleeding came from?

A. Below the neck and from the lungs. I felt the man would be found to have tuberculosis, and I was surprised when it was reported that he didn't have it.

Mr. PROSSER.—I now desire to introduce in evidence, if your Honor please, this picture.

Mr. BEEBE.—I have no objection.

Mr. PROSSER.—I desire to introduce in evidence, if your Honor please, a newspaper print, showing picture [61—47] of the insured referred to in this particular action, which has been identified by two witnesses.

The COURT.—Very well.

Mr. PROSSER.—I will ask that it be introduced in evidence.

Mr. BEEBE.—I am just consenting to the introduction of the picture, and not to the printed matter.

Mr. PROSSER.—It is understood, nothing but the picture.

Cross-examination.

(By Mr. BEEBE.)

Q. You are the eye, ear, nose and throat specialist for the Clinic? A. Yes, I am.

Mr. BEEBE.—That's all.

The COURT.—Stand aside.

Mr. BEEBE.—Q. Are you an examiner for the Prudential Life Insurance Company?

A. I am not.

(Testimony of Dr. Howard Clarke.)

Q. Did you tell this young man, Yuen Tai Kam, that you thought he had tuberculosis, at the time you made this examination?

A. I didn't tell him that he had, because I didn't know whether he had or not, but I thought he had, and I sent him to my partner for examination to confirm that fact. I was not considering him as an insurance man, I was advising to find out whether he had tuberculosis or not.

Mr. BEEBE.—That's all. [62—48]

TESTIMONY OF DR. HARRY L. ARNOLD, FOR
DEFENDANT.

DR. HARRY L. ARNOLD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician and surgeon in the city and county of Honolulu, Territory of Hawaii? A. Yes, sir.

Q. And of what medical schools are you a graduate? A. University of Michigan.

Q. How long have you been in the active practice of medicine and surgery? A. Since 1911.

Q. How long have you been in Honolulu practicing? A. Since 1919.

Q. And you are one of the specialists attached to the Clinic? A. Yes, sir.

(Testimony of Dr. Harry L. Arnold.)

Q. What is your specialty?

A. Internal medicine.

Q. I will ask you to look at this picture of one Yuen Tai Kam and ask you whether at any time he was a patient of yours?

A. I knew him under the name of V. C. Inn.

Q. Do you know when you treated him and for what?

A. It was in January, I think, of 1922. I know that only from having my memory refreshed by having it spoken [63—49] here. I am not sure about that date without looking up the record.

Q. Well, you are—you haven't looked up your record?

A. Dr. Clarke has the record here; if you will let me look at it? (Consults record.) Yes, January 13th, 1922.

Q. And on January 13th, 1922, did you make an examination of V. C. Inn, otherwise known as Yuen Tai Kam? A. Yes, sir, I did.

Q. And what was the result of such examination as you made?

A. I found no evidence of disease in his chest.

Q. Did you examine him as to any other portions of his body?

A. No, sir, only his lungs and heart.

Q. Lungs and heart? A. Yes, sir.

Q. And you found nothing to indicate that he had tuberculosis?

A. No, sir, not from my examination of him.

Q. And that was X-ray?

(Testimony of Dr. Harry L. Arnold.)

A. No, I made no X-rays except of his head; I made no X-ray of his chest.

Q. Well, you say you made no examination of his head or throat or nose?

A. No, sir, because he came from Dr. Clarke to me with [64—50] the request that I examine his lungs and heart for possible source of bleeding, and I found none on my examination of his chest.

Q. That is, so far as you could see, the bleeding did not come either from the chest or the heart?

A. I gave that as my opinion at that time and it still is, yes, sir.

Q. What was his general physical appearance at the time you examined him?

A. He looked to be distinctly below normal health; his health appeared to me to be somewhat impaired; rather pale.

Q. Did he make any statement to you with reference to his health or physical condition?

A. Other than that he had been spitting blood and bleeding, that's all I remember.

Cross-examination.

(By Mr. BEEBE.)

Q. You found his lungs all right, doctor?

A. Found no evidence of tuberculosis, which was what I was looking for.

Q. And his heart all right, also? A. Yes, sir.

Q. And you say you made an X-ray of his head?

A. I made an X-ray of his head.

Q. Did that indicate that he was all right, too?

[65—51]

(Testimony of Dr. Harry L. Arnold.)

A. Yes, sir.

Q. In other words, outside of his external appearance, of being pale, etc., he seemed all right, is that true? A. Yes, sir.

Q. By "all right" I mean in good health.

A. He was pale, as I remember; I think I remember distinctly his being pale at the time.

Q. That might have come from bleeding, anemia, or anything else? A. Yes, sir.

Q. That indicated not an excess of blood, isn't that true? A. Yes.

Redirect Examination.

(By Mr. PROSSER.)

Q. Was there anything to indicate the source of the bleeding, so far as your examination was concerned?

A. Not so far as my examination of him was concerned, no, sir.

Q. Was there anything to indicate that he had been bleeding, so far as your examination was concerned? A. Only his say-so.

Mr. PROSSER.—That's all.

Mr. BEEBE.—That's all.

Mr. PROSSER.—Now, if your Honor please, I desire to move that the answer heretofore filed in here by the [66—52] defendant be amended by the addition thereto of a third paragraph to read as follows,—that being the amendment of the pleading to conform to the proof: "Third. That subsequent to the death of Yuen Tai Kam, named as the

insured in said policy of insurance, the 7th day of April, 1922, and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan, named in said policy as beneficiary thereunder, that it refused to recognize said policy as valid because of false and erroneous statements made by the insured upon his examination by the medical examiner for defendant, prior to the issuance of said policy, and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premiums under said policy, which tender was refused by the said Chun Ngit Ngan, and did demand a return of said policy by said Chun Ngit Ngan to the defendant."

Mr. BEEBE.—We object to the offer to amend, if your Honor please, upon the ground that it is wholly immaterial and wholly incompetent, our position being, if your Honor please, that the facts set forth do not constitute a defense; in other words, that by contesting an insurance policy is meant, not a refusal to pay, or tender back of premiums, but the institution of an action within one year to cancel and set aside the policy.

The COURT.—I will allow the amendment to be filed, without [67—53] committing myself to the proposition of whether it is a good defense or not.

Mr. BEEBE.—Note an exception.

Mr. PROSSER.—We close our case, your Honor.

The COURT.—Have you anything more?

Mr. PROSSER.—Oh, one minute more. Mr.

Beebe, I will ask you to state in open court now whether the plaintiff in this case is still alive?

Mr. BEEBE.—I think she is still alive. I will have to ask. (After speaking with persons in the courtroom.) She is still alive, if your Honor please, or was at last reports. She was a week ago and she is coming back to Honolulu.

The COURT.—Have you anything further?

Mr. BEEBE.—I think that's all, if your Honor please.

I hereby certify the above 53 pages foregoing to be a complete and accurate transcript of my shorthand notes of the proceedings had and the testimony taken during the trial of the above-entitled case.

JAMES L. HORNER,
Official Reporter.

[Endorsed]: Filed at 11:40 o'clock A. M. June 23, 1924. [68—54]

THE PRUDENTIAL

INSURANCE COMPANY OF AMERICA

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amounts named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED

YUEN TAI TAN

FACE AMOUNT OF INSURANCE

--- FIVE THOUSAND ---

Dollars,

payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof, on the first day of May, 19 42, provided the Insured be then living and this Policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this Policy is in force.

PAYABLE to the Insured, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to CHUO KIO KAN, Beneficiary, wife of the Insured.---

ACCIDENTAL DEATH BENEFIT

--- FIVE THOUSAND ---

Dollars,

payable to the Beneficiary in addition to the Face Amount of Insurance, in event of death by accident as defined in the clause headed "Provisions as to Accidental Death Benefit," on the second page hereof, subject to the provisions therein set forth.

If there be no Beneficiary living at the death of the Insured the amount of insurance payable shall be paid to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

TOTAL AND PERMANENT DISABILITY BENEFITS.

MONTHLY INCOME TEN DOLLARS PER MONTH FOR EACH \$1000 of the Face Amount of Insurance, payable to the Insured in event of total and permanent disability before age 60, subject to the provisions as to Total and Permanent Disability contained in the Policy. WAIVER OF PREMIUMS in event of Total and Permanent Disability as hereinafter provided.

ANNUAL PREMIUM

--- Two Hundred Thirty-three and 95/100 --- Dollars,

payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the following due dates, the first day of May---

in every year during the continuance of this Policy, until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

IN WITNESS WHEREOF, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this first day of May

one thousand nine hundred and twent-two



Horace A. Snyder
President

William J. Hamilton
Secretary

Age 28

Twenty-Year Endowment Policy Annual Dividends. Premiums Payable for Twenty Years. Accidental Death Benefit. Total and Permanent Disability Provision. Monthly Installments Without Deduction from Insurance. Waiver of Premiums.

ONE 1227-441

FOUNDED BY JOHN F. DRYDEN
PIONEER OF INDUSTRIAL INSURANCE IN AMERICA

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GENERAL PROVISIONS.

GENERAL PROVISIONS.

Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable quarterly or semi-annually, any unpaid premiums required for complete payment for the current insurance year in which death occurs shall be considered an indebtedness to the Company, and when due, in full. Premiums are payable at the Home Office of the Company, but may be paid to an agent or broker of the Company on or before the expiration of the term of this Policy. Premiums are payable at the Home Office of the Company, but may be paid to an agent or broker of the Company, if any premium is not paid when due, as specified on the first page hereof, this Policy shall be void and all premiums forfeited to the Company, except as herein provided. The payment of any premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Grace in Payment of Premiums.—In the payment of any premium under this Policy, except the first, a grace of thirty-one days without interest will be allowed, during which time the Policy will remain in force, but if the Policy shall become a claim within the grace period the unpaid premiums for the then current policy year shall be deducted from the amount of insurance payable.

Change of Beneficiary.—If the right to change the Beneficiary has been reserved and if the Insured shall have migrated to majority and become a resident of the State in which the Insured resides, the Insured may at any time while this Policy is in force, by writing notice to the Company at its Home Office, change the Beneficiary or Beneficiaries under this Policy, such change to be subject to the rights of any previous assignor and to become effective only when a provision of the Policy shall have been made in accordance with the provisions of the Policy.

Assignments.—Any assignment of the Policy must be in writing, and the Company shall not be bound to recognize any assignment unless the original is deposited with it as filed at the Company's office. The Company shall assume any responsibility for the validity of an assignment.

Suitability.—If within one year from the date hereof the Insured shall die by suicide—whether sane or insane—the liability of the Company shall not exceed the amount of the premiums paid on this Policy.

Survivorship.—If within one year from the date hereof the Insured shall die from non-suicide, the Company shall pay the amount of the death benefit, but if the age of the Insured be more than one year at the time of death, the Company shall pay the amount of the death benefit less the amount of the premiums paid on this Policy.

Indebtedness.—Any indebtedness to the Company on account of this Policy will be deducted in any payment or payments or in any settlement under this

Reinstatement.—If this Policy is lapsed for non-payment of premium it will be reinstated any time after the date of lapse, provided the Endowment period has not expired, upon written application and payment of arrears of premiums with interest at the rate of five per cent, per annum, together with the reinstatement of all unexpired months and days, to be taken from the term of this Policy at the time of application for such reinstatement, and provided evidence of the insurability of the Insured satisfactory to the Company be furnished.

Modifications, etc.—No condition, provision or privilege of this Policy can be waived or modified in any way except by a written agreement signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, one of the Assistant Treasurers and one of the Assistant Actuaries. No modification or change to this Policy can be made by the Board of Directors, the Board of Directors of the State in which the same is issued. No Agent has power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

Table of Basis of Reserve and Computations.—The reserve upon this Policy for which funds are to be held, exclusive of any reserve on account of ~~contingencies~~ **contingencies**, ~~and Accidental Death Benefit~~, shall be computed upon the American Experience Table of Mortality with three and one-half per cent. interest per annum by the net level premium method. All computations in accordance with the terms of this Policy involving net premiums or reserve values based on a mortality table and interest shall be made upon the basis herein stated.

Entire Contract Contained in This Policy.—This Policy together with the Application, a copy of which is attached hereto, contains and constitutes the entire contract between the parties hereto, and all statements made by the Insured shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid the Policy or be used as a defense to a claim thereunder unless it be contained in the Application for the Policy and unless a copy of such Application be endorsed upon or attached to the Policy when issued.

DIVIDEND PROVISIONS

Annually during its continuance for so long as all premiums theretofore due have been paid, this Policy will be credited with a dividend from the surplus earnings of the Company as ascertained and apportioned by the Board of Directors. Such dividend shall be (1) paid in cash or (2) applied to the reduction of the premium then due, if any; or upon written request of the Insured it may be (3) applied to the purchase of a paid-up addition to the Policy, or (4) left to accumulate to the credit of the Policy with interest at the rate of three and one-half per cent. per annum plus such additional interest as the Company may declare on such funds and payable on maturity of the Policy or withdrawable in cash on any anniversary of the Policy. Such paid-up addition may be used to defray the cost of the premium for a period not exceeding ninety days after the date of the payment of the premium or to accumulate to the credit of the Insured for a period not exceeding ninety days after the date of the payment of the premium. If the Insured shall select the other dividend option, the dividend shall be paid in cash.

PROVISIONS AS TO ACCIDENTAL DEATH BENEFIT.

The amount of Accidental Death Benefit specified on the first page hereof shall be payable in addition to the Face Amount of Insurance immediately upon receipt of proof as at the Home Office of the Company that the death of the Insured occurred during the continuance of this Policy and prior to the maturity of the Policy and an Endowment, while there was no default in the payment of premium, as a result, directly and independently of all other causes, of bodily injuries, effected solely through external violent and accidental causes and that such death occurred within sixty days of the accident, provided, however, that no Accidental Death Benefit shall be payable if the death of the Insured resulted from suicide—whether sane or insane; from having lost consciousness; from intoxication by alcohol or drugs; from any criminal act of the insured; or from any cause of indirectly inflicted injury. Furthermore, it is hereby agreed, further, that if any Total and Permanent Disability Benefit, as hereinafter provided, shall be allowed under this Policy, these provisions as to Accidental Death Benefit shall be null and void.

Before making any payment on account of accidental death, the Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law.

The Accidental Death Benefit is granted in consideration of the payment of an extra, annual premium of \$, which is included in the amount of the premium stated on the first page hereof and which is payable at the same time and subject to the same provisions as to payment as the regular premium under this Policy.

PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY—WAIVER OF PREMIUMS—
MONTHLY PAYMENTS TO THE INSURED.

Disability Before Age 60—Waiver of Premiums.—If the Insured, after the first premium on this Policy has been paid, shall furnish the proof to the Company, that this Policy is in full force and effect and while there is no default in the payment of premium, that he, at any time after payment of such first premium, while less than sixty years of age, from any cause whatsoever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or to perform any work for any kind of compensation of financial value, the Company upon receipt of such proof shall waive the payment of each premium that may become payable thereafter under this Policy until such time as the Insured shall be able to resume his usual occupation or work, or until such time as he shall be able to perform any work on his own hands or the wrists, or of both feet above the ankles, or of one hand and one foot, shall be considered disabled or incapable within the meaning of this provision.

Disability Before Age 60—Monthly Income to the Insured.—If such disability shall occur before the Insured be sixty years of age and prior to the maturity of the Policy as an Endowment to the Company will, in addition to such waiver, pay to the Insured monthly as specified on the first page hereof, the sum of \$10 for each \$1,000 of the Face Amount of Insurance under the Policy. The first monthly payment shall be made six months after the Company shall have received notice of such disability and thereafter on the first day of each month thereafter during such disability. Interest due on any indebtedness under the Policy shall be deducted from such monthly payments.

Benefit. Each waiver of premium and such monthly payment shall be additional to all other benefits and obligations under this Policy except as to **Accidental Death Benefit** and the Policy shall be continued in force and the Face Amount of Insurance, less any indebtedness, shall become due and payable at death or maturity in the same manner as if the Insured had actually continued to pay the premiums.

Disability After Age 60 - Waiver of Premiums With Reduction of Face Amount of Insurance.—If the disability of the Insured as defined above shall occur after the Insured is sixty years of age, the Company upon receipt of due proof of each disability will waive the payment of each premium that may become payable thereafter under this Policy during such disability, but the Face Amount of Insurance hereunder shall be reduced by the amount of each premium so waived, and any loan and non-forfeiture values shall be adjusted accordingly, and upon the termination of the disability the reduced Face Amount of Insurance shall be paid.

Recovery from Disability.—The Insured, upon demand by the Company at any time during such disability and before the Company's liability hereunder has ceased, shall furnish due proof that he actually continues in a state of disability, as defined above, and in case of his failure so to do the Insured shall be deemed to have recovered from such state of disability.

In the event that the insured recovers from such state of disability no further premiums shall be waived and no further monthly payments shall be made, and any insurance under the Policy, exclusive of the Accidental Death Benefit, at the time of such recovery shall be continued in force subject to the payment by the insured of any premiums falling due thereafter.

Extra Premium for Total and Permanent Disability Benefits.—The Total and Permanent Disability Benefits are granted in consideration of the payment of an extra annual premium of \$ 24.00 which is included in the amount of the premium stated on the first page herof and which is payable at the same time and subject to the same provision as to payment as the regular premium under this Policy, provided, however, that in no event shall said extra premium be payable on or after the anniversary of the Policy next succeeding the date when the Insured attains sixty (60) years of age.

LOAN PROVISIONS.

If this Policy be continued in force, the insured may borrow from the Company, without the consent of the Beneficiary, if any, named herein, with interest at the rate of six per cent. per annum, payable at the end of each policy year, on the sole security of this Policy, in amount up to the limit of the Cash Surrender Value of this Policy, by executing a promissory note to the Company from all or any of the insureds on account of this Policy, by making such an application for the loan and assigning the Policy to the Company as security. For the purpose of borrowing under this Policy, the insureds shall be deemed to be jointly and severally liable to the Company shall equal or exceed the loan value at the time of such loan, nor until one month after notice to that effect shall have been mailed to the Company to the last known address of the insured, or the person to whom the loan was made, and of the assignee of record at the Home Office of the Company, if any. The insureds shall serve the Company to determine each, other than to pay premiums on policies in the Company, for a period not exceeding ninety days after application for each loan.

(NOTE.—At any time during the continuance of this Policy a statement of the course of trade business under the Policy will be furnished on request.)

NON-FORFEIT RE PROVISIONS.

POLICY NON-FORFEITABLE AFTER FIRST YEAR'S PREMIUM HAS BEEN PAID.
Non-forfeiture Value at End of First Policy Year.—If the Policy, after being in force one full year from the date of issue, has not been paid for, the Company will continue to force the insured, so long as the Policy is not paid for, and the Insured and Beneficiary are both alive, for a period of 30 days from the date of such premium as specified on the face of the policy or, in the event of the death of the Insured, for a period of 30 days from the date of death of the Insured. If the Insured dies during the period of continued insurance herein defined, there shall be paid to the Beneficiary, payable by the Company any premium that would have become due on this Policy up to the time of the death of the Insured. The Policy shall be continued in force.

Cash Surrender Value. If the Policy is fully surrendered to the Company within the term of the second year from its date of issue then, and if all amounts specified in the Surrender Policy, for the end of that year have been paid in full, the Company will pay to the owner the sum indicated by the following table, less any indebtedness due to the Company for the amount of the Policy. The Company reserves the right to defer the payment of any Cash Surrender Value in a period not exceeding six (6) months after the receipt of the Cash Surrender Policy.

[illegible][illegible]

1997: 127-131.

1 What is your FULL name? (Please print.) **YUEN TAI KAM**
 2 What is your present occupation or occupations? Explain exactly. **Asst. Manager, Long Hing Co.**
 3 Do you intend changing your present occupation? If so, state particulars. **No.**
 4 Are you now or have you any intention of becoming connected with the military or naval service, either regular or reserve? If so, give particulars. **No.**
 5 Are you engaged in or have you any intention of engaging directly or indirectly in aviation or submarine work? **No.**
 6 Do you intend living or traveling in Alaska or in any other possessions of the United States, or in any country except the United States or Canada? If so, state particulars. **No.**

7 Are you now insured in this or any other company or association? Give full particulars. If in this Company, give policy numbers also, including Industrial policies, if any.
 8 Name of Company Amount Kind of Policy Policy Number or This Company Year of Issue
None
 9 Do you have the policies in other companies are Double Indemnity or Disability Income policies.
 10 If you now have health insurance protection, state total amount of benefits per week so provided.

11 When were you born? 8 When was your spouse? 10 To whom is this insurance to be payable at your death? (Full name).
 12 What kind of policy is being applied for? (See back for details of this form.) 20 Year Endowment with C.O.D.
 13 To whom is this insurance to be payable at your death? (Full name). **CHUN NGIT NGAN** Age of Beneficiary **28** Age of Applicant **38** Age of Spouse **38** Age of Child **38**

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this Declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for. I further agree that the policy herein applied for shall be accepted subject to the provisions and conditions contained in the policy and the full first premium to be paid by me at the time of making this application, the policy shall not take effect until the Company and received by me and the full first premium thereon is paid, while my health, habits and occupation are the same as described in this application. It is understood and agreed, however, that if at the time of signing this application the full first premium is paid, the insurance shall take effect from the date of this application. In compliance with the provisions of the policy hereby applied for, provided this application is approved and accepted at the Home Office of the Company, in New York City, I hereby, under the plan for the premium paid, amount to be received by me.

Witness to Applicant's signature **Chun Ngit Ngan** Full signature of the person whose life is to be insured **Yuen Tai Kam**
 Date of **Honolulu** this **28th** day of **March** 1922

11 1704 N. Center Drive Street, Honolulu, T.H.
 12 1152 Street, Honolulu, T.H.
 13 Name of firm or employer **HONG INN Co.**
 14 Name of business **Crucial Goods, Curios**
 15 Is what address are premium notices or other communications to be sent? If this question is not answered they will be sent to the residence address. (Please print.) **P.O. Box 999, Honolulu, T.H.**
 16 Where have you lived during the past three years? State address in full **Honolulu, T.H.**
 17 Has any company or association ever declined to grant insurance on your life? (Answer in yes, give name of company and date.) **No.**
 18 Has any company or association ever modified your application either in amount, kind or premium? If so, give name of company, date, and nature of modification. **No.**
 19 Are you negotiating, or have you applied for other insurance on your life at this time in this or any other company or association? If so, give name of company or association and amount. **No.**
 21 Note.—State here any request in connection with the insurance proposed.

22 AMOUNT OF INSURANCE \$3000.00 23 Is the sum to be paid in full? **Annually** 24 What amount have you paid or advanced on account? **None** 25 Is this equal to the full first premium? **Yes**
 26 Do you wish the privilege of changing the beneficiary? **No**

DECLARATIONS MADE TO THE MEDICAL EXAMINER

In continuation of and forming a part of my application to the Prudential Insurance Company of America

1. What is your present or past kind of business, position held and length of time engaged? **Asst. Manager, Prudential Insurance Co.**
 2. Do you intend changing your present occupation? (If so, state particulars.)
 3. What other occupations have you followed, and now engaged in?
 4. Are you now or have you ever been engaged in or have you any intention of engaging in the manufacture or handling of acid or explosive liquids? (If so, give full particulars.)
 5. When were you born? **12 June 1894**
 6. What quantity do you use of daily, weekly, or monthly, what alcohol? **None**
 7. Have you ever used malt or spirituous liquors to excess? (If so, give full particulars.)
 8. Have you ever used (Opium? Chloral? Cocaine?) Or any narcotic drug? (If so, give full particulars.)
 9. Have you ever taken any of the following for the relief of the chest? (If so, give full particulars.)
 10. Have any Company or Association ever declined to grant insurance upon your life?
 11. On modified your application to live in a different kind, or a higher position than that for which you applied?
 12. Do you live with or have you ever lived with or been closely associated with a non-resident? (If so, give full particulars.)
 13. Have you ever been a member of a fraternal organization?
 14. Have you ever been a member of a fraternal organization?

10. Have you ever had—(Answer Yes or No. If you give full particulars in your own words.)
 Asthma? **No** Heart? **No** Fatigue? **No**
 Hoarseness? **No** Rheumatism? **No** Gout? **No**
 Spitting of blood? **No** Has been from sex? **No** Increase of blood or prostate? **No**
 Consumption? **No** Canker? **No** Throat? **No** Kidney or bladder? **No**
 Diabetes? **No** Painful or sore? **No** Appendicitis? **No**
 Leprosy? **No** Stomach trouble? **No** Cancer? **No**
 Loss of vision? **No** Chronic diarrhea? **No** Cancer? **No**
 Paralysis? **No** Disease of the heart? **No** Tumors? **No**
 Permanent loss of voice? **No** Dyspepsia? **No** Liver on any part of body?

IF LIVING
 FAMILY RECORD
 State of Health Age Cause of Death If a long one Date of Death Previous Rank
 Father **50** **good**
 Mother **45** **good**
 Brothers **3** **good**
 (3) **2** **good**
 Sisters **2** **good**
 (3) **4** **good**

QUESTIONS TO BE ANSWERED BY APPLICANT IF A WOMAN
 12a. Who is dependent upon you for support? (State age.)
 13a. Number of children had? **3**
 Age of eldest? **Youngest**
 13b. Are you pregnant?
 If so, how far advanced?
 14a. Have you ever had a tumor or any disease of the breast?
 15a. Is he insured in this Company?
 16a. Have you ever had a tumor or any disease of the breast?
 17a. Have you ever had a tumor or any disease of the breast?
 18a. Have you ever had a tumor or any disease of the breast?

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that they shall form a part of the contract of insurance applied for, and I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which may be thereby acquired.

Dated this **21** day of **April** 1922 **Yuen Tai Kam**
 Applicant's Signature

Cash Surrender Values Under Paid-up Endowment and Paid-up Term Policies.—If this Policy shall lapse, as above, and a Paid-up Endowment Policy be issued or a Paid-up Term Policy be put in force in lieu thereof, such Paid-up Endowment or such Paid-up Term Policy may be surrendered at any time for its full reserve value at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value.

TABLE OF LOAN AND NON-FORFEITURE VALUES.
(Values subject to reduction on account of any outstanding indebtedness as heretofore provided.)

12228

The Cash Surrender and Loan Values, Paid-up Endowment Policies and Pure Endowment stated in the following table apply to a policy of \$1000, Face Amount of Insurance. As the Face Amount of Insurance under this Policy is \$5000, the Cash Surrender and Loan Value (column 1), the Paid-up Endowment Policy (column 2) or the Pure Endowment (column 3) available in any year will be five times the amount stated in the table below for that year.

(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance	(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance
1 Year	None	None	11 Years	\$428 00	\$575 00
2 Years	\$50 00	\$88 00	12 "	482 00	628 00
3 "	82 00	140 00	13 "	540 00	681 00
4 "	118 00	197 00	14 "	601 00	734 00
5 "	160 00	258 00	15 "	665 00	787 00
6 "	198 00	311 00	16 "	726 00	832 00
7 "	239 00	363 00	17 "	790 00	875 00
8 "	282 00	416 00	18 "	857 00	918 00
9 "	328 00	469 00	19 "	927 00	959 00
10 "	376 00	522 00	20 "	1000 00	Policy Payable

*The tabular loan value at the end of any year, discounted at the rate of six per cent. per annum, shall be available to the insured at any time after the entire premium for that year has been paid.

The non-forfeiture values in the above table are based upon the American Experience Table of Mortality with three and one-half per cent. interest per annum, and the net value of any such non-forfeiture value, from the second to the fifteenth year, is at least equal to the entire reserve on this Policy, according to the foregoing standard, less a percentage (not more than two and one-half) of the Face Amount of Insurance under the Policy; thereafter, such net value is the full reserve by said standard, less a surrender charge, if made, of not more than one-twentieth of one per cent. of the Face Amount of Insurance under the Policy.

If the Face Amount of Insurance be increased by dividend additions the Loan and Cash Surrender Values will be increased by the full reserve on account of such additions and the other non-forfeiture values modified accordingly.

If the premiums on this Policy be paid in quarterly or semi-annual installments, due allowance will be made in computing values from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated; provided, however, that if more than one but less than two full years' premiums shall have been paid an allowance of fifteen days of continued insurance will be made for each quarter of a year for which the premium has been paid.

PROVISIONS AS TO MODES OF SETTLEMENT AT MATURITY.

The Insured may at any time while this Policy is in force, subject to the rights of any assignee and with the power of revocation, by written notice to the Company, designate any one of the following options as the manner in which the amount of insurance shall be payable in lieu of being paid in one sum, and the Company will then endorse on the Policy that payment shall be made according to the option designated, but if the Insured shall have made no such designation, the Beneficiary shall have the right of designation; provided, however, that in no event shall Option 1 or 2 be available to an individual Beneficiary if the amount of each installment payable thereunder to such Beneficiary would be less than \$10, nor shall Option 3 be available if the amount of insurance payable be less than \$1,000 and none of said options shall be available if the Beneficiary be a corporation or a firm. If this Policy matures as an Endowment and be payable to the Insured, and if the Insured shall designate one of the following options as the mode of settlement, the provisions of such option shall be construed as applying to the Insured in the same manner as they would have applied to the Beneficiary if the Policy had matured by death.

Option 1. Monthly Installments for Definite Number of Years.—The amount of insurance or a part thereof to be payable in equal monthly installments, each installment of the amount stated for the definite number of years selected, together with dividends, if any, according to the following table:

Number of Years During Which Monthly Installments Are Paid	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of Monthly Installment Per \$1,000 of Insurance	\$42.55	\$26.90	\$22.03	\$17.95	\$15.20	\$13.25	\$11.58	\$10.64	\$9.74	\$9.00	\$8.30	\$7.87	\$7.42	\$7.02	\$6.69	\$6.49	\$6.14	\$5.91	\$5.70	\$5.51	\$5.34	\$5.18	\$5.04	\$4.92

Option 2. Monthly Installments for Definite Number of Years and Continuously Thereafter.—The amount of insurance or a part thereof to be payable in equal monthly installments, each installment of the amount stated for the age of the Beneficiary at the death of the Insured, together with dividends, if any, and payable during the definite number of years selected, and thereafter so long as the Beneficiary shall live, as specified in the following table:

Amount of Monthly Installment Per \$1,000 of Insurance, Payable During Years Stated and Thereafter During Lifetime of the Beneficiary	Definite Number of Years	Age of Beneficiary When Policy Becomes a Claim																											
		17 and Under	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43
5 Years	\$2.91	\$3.94	\$3.90	\$3.86	\$4.00	\$4.03	\$4.06	\$4.08	\$4.11	\$4.11	\$4.18	\$4.21	\$4.25	\$4.28	\$4.32	\$4.38	\$4.41	\$4.45	\$4.50	\$4.55	\$4.61	\$4.67	\$4.73	\$4.79	\$4.85	\$4.91	\$4.97	\$5.03	\$5.09
10 Years	\$2.87	\$3.89	\$3.91	\$3.93	\$3.95	\$3.98	\$4.00	\$4.03	\$4.06	\$4.09	\$4.12	\$4.15	\$4.19	\$4.22	\$4.26	\$4.30	\$4.34	\$4.38	\$4.43	\$4.48	\$4.53	\$4.59	\$4.64	\$4.70	\$4.75	\$4.81	\$4.87	\$4.92	\$4.98
15 Years	\$3.81	\$3.83	\$3.85	\$3.87	\$3.89	\$3.91	\$3.94	\$3.96	\$3.99	\$4.02	\$4.05	\$4.08	\$4.11	\$4.14	\$4.18	\$4.21	\$4.25	\$4.29	\$4.34	\$4.38	\$4.43	\$4.48	\$4.53	\$4.59	\$4.64	\$4.70	\$4.75	\$4.81	\$4.87
20 Years	\$3.74	\$3.76	\$3.78	\$3.80	\$3.82	\$3.84	\$3.86	\$3.89	\$3.91	\$3.94	\$3.97	\$3.99	\$4.02	\$4.05	\$4.08	\$4.12	\$4.15	\$4.19	\$4.23	\$4.27	\$4.31	\$4.35	\$4.40	\$4.44	\$4.49	\$4.53	\$4.58	\$4.63	\$4.68

Amount of Monthly Installment Per \$1,000 of Insurance, Payable During Years Stated and Thereafter During Lifetime of the Beneficiary	Definite Number of Years	Age of Beneficiary When Policy Becomes a Claim																											
		39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61 and Over	62	63	64	65	66
5 Years	\$4.79	\$1.86	\$4.94	\$5.01	\$5.10	\$5.18	\$5.28	\$5.37	\$5.48	\$5.59	\$5.71	\$5.84	\$5.97	\$6.11	\$6.27	\$6.43	\$6.60	\$6.78	\$6.97	\$7.18	\$7.40	\$7.63	\$7.87	\$8.11	\$8.36	\$8.61	\$8.87	\$9.13	\$9.39
10 Years	\$4.70	\$1.77	\$4.84	\$4.91	\$4.98	\$5.06	\$5.15	\$5.24	\$5.33	\$5.43	\$5.53	\$5.63	\$5.75	\$5.87	\$6.00	\$6.13	\$6.26	\$6.40	\$6.55	\$6.70	\$6.86	\$7.02	\$7.18	\$7.34	\$7.50	\$7.67	\$7.83	\$8.00	\$8.17
15 Years	\$4.58	\$4.61	\$4.70	\$4.76	\$4.83	\$4.90	\$4.97	\$5.04	\$5.12	\$5.20	\$5.28	\$5.36	\$5.43	\$5.53	\$5.62	\$5.71	\$5.81	\$5.90	\$5.99	\$6.08	\$6.17	\$6.26	\$6.31	\$6.36	\$6.41	\$6.46	\$6.51	\$6.56	\$6.61
20 Years	\$4.44	\$4.49	\$4.54	\$4.59	\$4.64	\$4.70	\$4.75	\$4.80	\$4.86	\$4.92	\$4.97	\$5.03	\$5.09	\$5.14	\$5.20	\$5.25	\$5.30	\$5.35	\$5.39	\$5.44	\$5.49	\$5.54	\$5.59	\$5.64	\$5.69	\$5.74	\$5.79	\$5.84	\$5.89

Option 3. Trust Fund.—The amount of insurance or any portion thereof not less than \$1,000 to be left during the lifetime of the Beneficiary in trust with the Company, and the Company will pay thereon, so long as the said amount or said portion thereof remains with the Company, interest at the rate of three and one-half per cent. per annum, together with dividends, if any. The said Trust Fund shall be paid at the death of the Beneficiary to the executors or administrators of the Beneficiary.

Annual, Semi-Annual or Quarterly Installments.—computed at the rate of three and one-half per cent. per annum compound interest, will be paid upon request in lieu of the monthly installments provided under Options 1 and 2, unless the Insured shall have otherwise directed in writing.

Unpaid Installments at Death of Beneficiary.—If one or more installments shall actually be paid in accordance with the provisions above and if the Beneficiary shall die before all installments payable shall have been paid, and if there be no contingent beneficiary designated by the Insured or by the Beneficiary after the death of the Insured, the unpaid installments will be computed at the rate of three and one-half per cent. per annum compound interest and paid in one sum to the executors or administrators of the Beneficiary.

Dividends with Installments or Interest.—If the amount of insurance be payable in installments, monthly or otherwise, or be left in trust with the Company, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will effect an increase in the installments or in the interest payable on account of the trust fund, but no dividend will be declared on installments payable after the period fixed for installments certain.

Received, MAY 8 - 2.30

MEDICAL DEPARTMENT

APPROVED

MAY 10, 1922

By

REFERRED TO MED. DEPT.

BY LAY APPR

Med. Ex'r O.K.

N.R.

sent

Ex Post Memorandum

ORDINARY ISSUE DEPARTMENT

ACCEPTED SUBJECT TO
CONDITIONS OF APPLICATION

MAY 12 1922

Inspection

Ordered

MAY 8 1922 H.F.L.

Details to be adjusted

Age 28

Reviewed, hold for

R. M.

Med. Corres

Dist. Corres

MAY 8 - 2.30 TO BE FILLED IN BY MANAGER OR DETACHED SPECIAL AGENT. QUESTIONS ON REVERSE SIDE APPLICABLE TO CASE MUST BE ANSWERED.

Give date on which examination was ordered.
Are there any other agents or brokers interested in this application?
(If yes, give name or names)

HAWAIIAN TRUST CO.

Give applicant's name

No

Who secured the application below?

HAWAIIAN TRUST CO., LTD.

(Print or stamp FULL name)

Sam L. Aline employee

Manager

APPLICATION FOR
INSURANCE IN

The Prudential Insurance Company of America,

Home Office, Newark, New Jersey

Incorporated under the laws of the State of New Jersey

Located at Honolulu T. H.

NUMBER

3955636

- 1 What is your FULL name? (Please print.) **YUEN TAI KAM**
- 2 What is your present occupation or occupations? Explain exact duties.
Asst. Manager, Fong Inn Co.
- 3 Do you intend changing your present occupation? If yes, state particulars.
No
- 4 Are you now or have you any intention of becoming connected with the military or naval service, either regular or reserve? If so, give particulars.
No
- 5 Are you engaged in or have you any intention of engaging directly or indirectly in aviation or submarine work?
No
- 6 Do you intend living or traveling in Alaska, or in any other possessions of the United States, or in any country except the United States or Canada? If yes, state particulars.
No

- 7a Are you now insured in this or any other company or association? Give full particulars. If in this Company, give policy numbers also, including Industrial policies, if any.

Name of Company	Amount	Kind of Policy	Policy Number if in this Company	Year of Issue
None				

- 7b Indicate if the policies in other companies are Double Indemnity or Disability Income policies.

- 7c If you now have health insurance protection, state total amount of benefits per week so provided.

- 8 Where were you born? 8 When were you born? 10 Age nearest birthday? 11 Are you married?
- | | | | | | |
|------------------------------|----------------|--------------|---------------|----|-----|
| China
(State or Country.) | Month.
June | Day.
12th | Year.
1894 | 28 | Yes |
|------------------------------|----------------|--------------|---------------|----|-----|

- 12 What kind of policy is desired? (Use such terms as Whole Life, 20-Year Endowment, etc., and if desired, state benefit or face as desired.)
20 Year Endowment with A. D. B.

- 13 To whom is this insurance to be payable at your death? (Full name.)
CHUN NGIT NGAN

Age of Beneficiary

23

Relationship to Applicant

Wife

Present residence

Same

- 25 Do you wish the privilege of changing the beneficiary? Answer yes or no.

Yes.

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examining, shall constitute the application and become a part of the contract of insurance hereby applied for. I further agree that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained and that UNLESS the full first premium is paid by me at the time of making this application, the policy shall not take effect until issued by the Company and received by me and the full first premium thereon is paid, while my health, habits and occupation are the same as described in this application. It is understood and agreed, however, that if at the time of signing this application the full first premium is paid, the insurance shall take effect from the date of this application, in accordance with the provisions of the policy hereby applied for, provided this application is approved and accepted at the Home Office of the Company, in Newark, New Jersey, under the plan, for the premium paid and amount of insurance applied for.

Witness to Applicant's signature..... Sam. L. Aline

Full signature of the person whose life is to be insured

Yuen Tai Kam

Dated at..... Honolulu

this.....

20th

day of

March

1922.

Clerk's Note:
For page 74, see back hereof.

73

68

Robert J. Smith
Filed in the Supreme Court
June 23, 1937 at 3:30 o'clock
of 1937



James J. Smith Jr.
1937
EXHIBIT
No. 10307

QUESTIONS TO BE ANSWERED BY THE AGENT IF APPLICANT WAS BORN OUTSIDE OF THE UNITED STATES OR CANADA.

1 How long has applicant been in the United States or Canada? <i>1 1/2 years</i>	3 Can he speak English so as to be readily understood? <i>Yes</i>	Armenian...	Hebrew...	Magyar...	Rumanian...	Slovak...
2 Can he read or write? In what language? <i>Yes English Chinese</i>	4 Does a check against the nationality of the applicant show he is not in the United States? <i>Chinese</i>	Bohemian...	State citizenship where born	Polish...	Russian...	Syrian...
		Greek...	Lithuanian	Portuguese...	Servian...	Turkish...

QUESTIONS TO BE ANSWERED BY THE AGENT IF THE APPLICANT IS A WOMAN

1 With whom does applicant reside?	2 If husband is living, for what amount is he insured in his wife's name? If in this Company give number of policy	3 What is husband's name, and occupation?
4 State names and ages of living children.	5 From what source does applicant derive means of support?	6 Who is dependent on applicant for support?
		7 Does applicant reside in a house or building where interesting figures are sold?

AGENT'S GENERAL REPORT. (REQUIRED WITH EVERY APPLICATION.)

The Company desires to emphasize the importance of the Agent's General Report, which must be made by the writer of the application, who will be held PERSONALLY RESPONSIBLE for the accuracy of the information given. The statements contained therein should be based on facts obtained after careful and thorough investigation.

1 How long have you known the applicant? <i>10 years</i>	2 If the home surroundings healthful and such as to warrant the amount of insurance applied for? <i>Yes</i>	3 If the applicant is a minor, state parent names and occupations. <i>✓</i>	4 After personal investigation do you find applicant has been and is of temperate habits and good moral character? <i>Yes</i>	5 Who is to pay the premiums? <i>Applicant</i>
6 For what reason is the applicant ineligible under the Company's rules as to occupation, height and weight, etc.? <i>No rating</i>	7 Is any ordinary or industrial insurance in this or any other company or with the H. T. B. Co. to be discontinued if policy now applied for is issued? Give full particulars <i>No.</i>	8 Does applicant appear to be in good health? <i>Yes</i>	9 Do you recommend the risk to the Company and advise the time of the policy applied for? <i>Yes</i>	
10 What is the purpose of the insurance applied for? <i>(Family protection business insurance, insurance tax, etc.)</i>				

I hereby certify that the above report is the result of a personal investigation by me and I hereby vouch for the reliability of the information given.
HAWAIIAN TRUST CO. LTD.
James J. Smith Jr. Title

BEFORE HANDING APPLICATION TO THE MEDICAL EXAMINER, BE SURE THAT ALL QUESTIONS IN THE APPLICATION AND AGENT'S REPORT ARE PROPERLY ANSWERED. CHANGES, CORRECTIONS OR ERASURES SHOULD BE INITIALED BY THE APPLICANT.

DETAILS OF ILLNESSES RECORDED ON THE REVERSE SIDE

Name _____

Duration

2000

Complications

Sequela

Date of Complete Recovery _____

No of

Complications
A P P R O V E D

MAY 10 1922

BY

ORD. ISSUE RE
USE ONLY
APR 9-1922
ORDINARY ISSUE

MEDICAL DEPT. USE ONLY

REMARKS:

CREDIT \$5.00

MAY 8 1922

NG 7.

55.00 fees

ORD 72

10307
2
1924
INDEPENDENT'S
MAY 2
William W. Hoffman
CLERK
MAY 2

L. 1556

Rec'd & Filed in the Bureau of Land

June 23 to 24 A 3:10 - about 9. M

Robert Parker Jr.
Assistant Clerk

16K

DEFENDANT'S EXHIBIT No. 3.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

STIPULATION RE TESTIMONY OF DR. IGA
MORI AND NOTICE OF DECISION ON
ERROR.

IT IS HEREBY STIPULATED by and between the parties hereto that Dr. Iga Mori would, if present upon the trial of this case, testify as a witness on behalf of the defendant as follows:

That he is a physician duly licensed to practice in the Territory of Hawaii and that as such licensed physician he treated Mr. Yuen Tai Kan, a Chinese merchant, for neurasthenia and hemoptysis (spitting of blood) from January 21st, 1922, to May 22d, 1922, and that prior to said dates the said Yuen Tai Kan had been going to said Iga Mori for treatment for several years.

Dated, Honolulu, April 14, 1924.

THOMPSON, CATHCART & BEEBE,
Attorneys for Plaintiff.

FREAR, PROSSER, ANDERSON &
MARX,

M. F. P.,
Attorneys for Defendant. [77]

No. 1556. In the Supreme Court of the Territory of Hawaii. October Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Notice of Decision on Error. Filed January 12, 1925, at 3:35 o'clock P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2—13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [78]

No. 1556.

In the Supreme Court of the Territory of Hawaii.
October Term, 1923.

ERROR.

CHUN NGIT NGAN,
Plaintiff and Defendant in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant and Plaintiff in Error.

NOTICE OF DECISION ON ERROR.

To the Honorable Third Judge of the Circuit Court
of the First Judicial Circuit, Territory of
Hawaii:

You will please to take notice that in the above-entitled cause the Supreme Court has filed the following decision on error:

DECISION ON ERROR.

In the above-entitled cause, pursuant to an opinion of the above-entitled court filed on the 11th day of December, 1924, the court ordered that the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of the plaintiff and against the defendant, be set aside and a new trial granted.

Dated at Honolulu, T. H., January 12, 1925.

By the Court:

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of
Hawaii.

Dated at Honolulu, T. H., January 12, 1925.

By the Court:

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of
Hawaii. [79]

The foregoing notice is hereby approved as to
the form thereof, and it is ordered that the same
issue forthwith.

Dated Honolulu, T. H., January 12, 1925.

[Seal]

A. PERRY,

Associate Justice of the Supreme Court of the Ter-
ritory of Hawaii.

CERTIFICATE.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court
of the Territory of Hawaii, do hereby certify that
the foregoing document, and attached hereto, is a
full, true and correct copy of the original notice of
decision on error which is now on file in the office
of the Clerk of the Supreme Court in the foregoing
entitled cause, Numbered 1556.

WITNESS my hand and the seal of the Supreme
Court of the Territory of Hawaii, at Honolulu,

City and County of Honolulu, this 12th day of January, A. D. 1925.

J. A. THOMPSON,

Clerk Supreme Court, Territory of Hawaii.

[Endorsed]: Law Number 10307. Supreme Court, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. Certified Copy of Notice of Decision on Error from the Supreme Court. Filed at 4 o'clock, P. M., Jan. 12, 1925. Sibyl Davis, Clerk. [80]

[Endorsed]: L.—No. 10307. Reg. 9, pg. 282. Circuit Court, First Circuit, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. 39/197. L.—No. 10307. Defendant's Exhibit 3. Filed May 2, 1924. William Hoopai, Clerk.

Stipulation and Supreme Court Remittitur. Filed April 15, 1924, at 4 P. M. B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, Attorneys for Defendant.

No. 1556. Rec'd and Filed in the Supreme Court, June 23, 1924, 3:10 o'clock, P. M. Robert Parker, Jr., Assistant Clerk. [81]

DEFENDANT'S EXHIBIT No. 4.

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

STIPULATION RE TESTIMONY OF DR. ED.
DE MEGLIO AS A WITNESS ON BEHALF
OF THE DEFENDANT.

IT IS HEREBY STIPULATED by and between the parties hereto that if Dr. Ed. De Meglio were called as a witness on behalf of the defendant in the above-entitled cause he would testify as follows:

That he knew deceased, Yuen Tai Kam, and he was under his professional care for a few weeks prior to December 7, 1921. At that time the said Yuen Tai Kam suffered periodical hemorrhages from his bucal cavity, which he and several doctors attributed to be from his lungs.

Any pulmonary bleeding is a symptom of advanced tuberculosis and is always accompanied by a severe cough; I found no cough present, so, by means of a long laryngeal applicator, took some smear from his bronchus, and had it examined, also took some of the blood, both showed no tuberculosis whatever, only a mixed infection, mostly Streptococci. After a

thorough examination of his Nasopharynx, found the bleeding-point on the posterior end of the lower turbinate consisting of an ulcer over a varicose [82] blood vessel. The blood examination showed him to be slightly hemophilic and the nasal infection, to be from his right frontal sinus. I removed the middle turbinate, to provide free drainage and injected subcutaneously over his chest, 10 cc of Thromboplastin every other day, 4 times. All the bleeding has stopped so far. If he should show *an* trace of it again, would advise you to give him Elixier chlorocalcium with Ergotol combined, 4 times daily. Otherwise I would like you to give him Hypodermically on his return, the Galen-Tonic which I send, every other day, alternating No. 1 and 28. After that, let him take the Bland mass pills I send until used up. I would appreciate greatly, to hear from you in regard to his case, from time to time, and remain your fraternally.

That the said Dr. De Meglio is a physician legally qualified to practice his profession within the State of Oklahoma and the City of Oklahoma, and that the foregoing statement was contained in a letter by him directed to Dr. Chung of Honolulu, which said letter was dated December 7, 1921. This stipulation is entered into without waiving any objection as to relevancy or materiality of the foregoing.

Dated, Honolulu, January 3, 1924.

THOMPSON, CATHCART & BEEBE,

Per E. H. BEEBE.

Attorneys for Plaintiff. [83]

[Endorsed]: L.—No. 10307. Reg. 9, pg. 282. Circuit Court, First Circuit, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. First of 1924 Files. Stipulation Re Testimony of Dr. Ed. De Meglio as a Witness on Behalf of the Defendant.

L.—No. 10307. Defendant's Exhibit 4. Filed May 2, 1924. William Hoopai, Clerk.

Filed January 21, 1924, at 10:30 A. M. B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, Attorneys for Defendant.

No. 1556. Rec'd and Filed in the Supreme Court, June 23, 1924. At 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [84]

DEFENDANT'S EXHIBIT No. 5.

[Cablegram.]

Received 8.20 A. M. Subject to Terms and Conditions at Back Hereof, Which Are Ratified and Agreed to.

(Apr. 4, 1923.)

Rec'd Apr. 4, 1923.

8:20 A. M.

G HU 2 NEWARK NJ 19

M. A.

Trust Co. Honolulu.

Kam claim rejected Make legal tender before witness of premium to wife Obtain policy and release.

PRUDENTIAL.

No inquiry respecting this Message can be attended to without the production of this paper. Repetitions of doubtful words should be obtained through the Company's offices, and not by applying directly to the sender.

L.—No. 10307. Defendant's Exhibit 5. Filed May 2, 1924. William Hoopai, Clerk. [85]

COMMERCIAL PACIFIC CABLE COMPANY.
San Francisco Postal Telegraph-Cable Offices.
Honolulu3 Alexander Young Building
Midway Islands Sand Island
Guam Soumaye
ManilaEl Hogar Filipino
Shanghai 7 The Bund
Commercial Cable and Postal Telegraph Companies.
In the United States.

TERMS AND CONDITIONS

The Company may decline to forward the Message, though it has been received for transmission; but in case of so doing, shall refund to the sender the amount paid for the transmission of the Message. The Company will refund to the sender the charges paid by him—

- (a) For any telegram which fails to reach the Addressee through any neglect or fault of the Company or its servants, whilst the Message remains under the control of the Company.
- (b) For any repeated telegram which, owing to errors made in transmission by the Company's servants, has manifestly not fulfilled its object.

- (c) For every telegram in plain language which has manifestly been unable to fulfill its object, in consequence of errors made in its transmission, unless the errors have been rectified by paid service advice.

Whatever may be the damage caused either by errors, mistakes, delays, mis-delivery, non-delivery, or otherwise, in respect of any Message entrusted to the Company for transmission, and whether the same arise from the neglect or the fault of the Company's servants, or howsoever otherwise the same may arise, the Company shall not be liable except to refund to the sender in the cases above mentioned the amount paid to the Company for the transmission of the Message.

The control of the Company over the Message shall be deemed to have entirely ceased at any point where in the course of the transit of the Message to its destination, it may be entrusted by the Company (and the Company shall have full powers so to entrust the Message) for further transmission to any other system, service, or line of telegraph.

CLARENCE H. MacKAY,

President.

GEO. G. WARD,

Vice-Pres't and Gen'l Manager.

Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [86]



CLAIMANT'S STATEMENT

THE PRUDENTIAL INSURANCE CO. OF AMERICA

Incorporated under the laws of the State of New Jersey
Forrest E. Dwyer, President HOME OFFICE, NEWARK, N. J.

(BEFORE COMPLETING THIS STATEMENT, READ THE INSTRUCTIONS ON THE REVERSE SIDE)

1 No. of Policy <u>3955636</u> Amount, \$ <u>5000.00</u>	No. of Policy <u>1923</u> Amount, \$ <u>1000.00</u>
No. of Policy _____ Amount, \$ _____	No. of Policy <u>APR 5</u> Amount, \$ _____
No. of Policy _____ Amount, \$ _____	No. of Policy _____ Amount, \$ _____

2 Full name of deceased. Yuen Tai Kam3 Date of death. February 5th 1923.4 Legal residence at time of death. 1709-H Center Drive, Honolulu, T. H.5 Insured's occupation. Asst. Manager, Fong Inn Co.6 Insured - date of birth. Month June Day 12th Year 1894.

7 State source from which date of birth was obtained.

(Family record, certificate of birth or other records should be referred to.) Certificate of Identity from U.S. Immigration8 Have any proceedings under any bankruptcy law ever been instituted by or against the insured, or has insured made any assignment or executed any deed for the benefit of creditors? No9 What other insurance was in force on the life? (Give name of Company and amount of insurance.) None10 How many children survive the insured, and what are their ages? None.11 Are you related to the insured, and how? Yes, wife12 What is the date of your birth? June 3rd 1898

The person executing this statement represents to The Prudential Insurance Company of America that no proceedings under any bankruptcy law have ever been instituted by or against him (or her) nor has he (or she) at any time made any assignment or executed any deed for the benefit of creditors.

Dated February 7th 1923Witness Sam L. AlinaSignature Chun Ngit NganPost-office address: 1709-H Centre Drive Honolulu, T.H.

Affidavit not required if claimant's statement, with affidavit, must be:

1 By what right or title do you make claim

2 If assignee, why and for what was the pc

3 What is the amount of the insured's inde

4 What amount do you claim by reason of

State of _____

County of _____

On this _____

who subscribed the foregoing statement and

YOUNG MERCHANT DIES



YUEN KAM.

YUEN KAM, WIDELY KNOWN CHINESE, DIES AFTER LONG ILLNESS

Yuen Kam, one of the most prominent young Chinese of Honolulu, died early this morning after an illness of several months. He was assistant manager and a copartner in the well-known firm of the Fong Inn Co., being a nephew of Mr. Fong Inn. He is survived by the young widow. Several brothers and sisters and his father live in China.

Yuen Kam was born in China and came to Honolulu about 15 years ago and rapidly rose to a position of influence in the community. He made several buying trips to China for the Fong Inn Co.

The body may be viewed by friends from 6 o'clock this evening until 1 o'clock tomorrow afternoon at Silva's undertaking rooms. The funeral will be held tomorrow afternoon from the Second Chinese Congregational church on Beretania street.

(Reprinted from The Honolulu Star-Bulletin of February 5, 1923.)

It is other than these, the following

y appeared before me the above named

INSTRUCTIONS

A separate **Claimant's Statement** must be made by each claimant. Affidavit not required if claimant is beneficiary (or guardian thereof), administrator or executor.

When the insurance is payable to a beneficiary of full age, this statement must be completed by such beneficiary.

If the beneficiary is a minor, this statement must be completed by a guardian, and a certified copy of letters of guardianship furnished.

If the policy is payable to the insured's estate, this certificate must be executed by the administrator or executor, who must furnish an official certificate of appointment.

If the policy has been assigned, this statement must be completed by the assignee, who must submit the original assignment or a certified copy of it.

If the beneficiary named in the policy is dead, evidence of death must be submitted (official transcript of death or a sworn statement of last attending physician.)

The Attending Physician's Statement must be completed by the doctor in attendance during last illness of the insured, and sworn to before an officer duly authorized to administer oath, who should imprint his seal thereon and state the date of expiration of his commission; or if he has no seal, his authority and the genuineness of his signature must be attested by the proper official.

When a coroner's inquest has been held, a certified copy of the verdict must be furnished as a part of the proof of death.

The Identity Statement must be made by some person of legal age, well acquainted with, but not related to, the insured, who has seen the remains and is not interested in the insurance.

The Undertaker's Certificate must be completed unless the remains were viewed and identified by a representative of the Company.

If the total amount of insurance in this Company exceeds \$1,000, the identity and undertaker's certificates must be sworn to before an officer duly authorized to administer oath, who should imprint his seal thereon and state the date of expiration of his commission; or if he has no seal, his authority and the genuineness of his signature must be attested by the proper official.

The employment of a third person for the collection of a valid claim due from this Company is unnecessary and a needless expense.

No person acting on behalf of the Company is permitted to demand or receive any compensation for notarial or other services in preparing the proofs of death. The claimant, however, is expected to pay the fees of officials, who are not representatives of the Company, for administering oaths in connection with the several statements constituting proofs of death and the expense of attest certificates, if any is required.

All claims are due and payable immediately upon receipt of satisfactory proof of death, and correspondence and attendance delay will be avoided if interested parties will see that the foregoing requirements are strictly complied with and that the answers to all the questions are written clearly and in full.

The Company reserves the right to require or obtain such additional evidence of death as may seem necessary.

MODES OF SETTLEMENT

Ordinary Policies.—The whole amount payable or a portion thereof may be taken in equal monthly instalments for a definite number of years. Or, the whole amount payable or a portion thereof may be taken in equal monthly instalments payable during a definite number of years selected, and thereafter as long as the beneficiary may live, as per schedule below.

MONTHLY INSTALMENTS PER \$1000 OF INSURANCE

MONTHLY INSTALMENTS FOR DEFINITE NUMBER
OF YEARS Number of Years—Amount of
Each Instalment per \$1000

CONTINUOUS MONTHLY INSTALMENTS
Amount of Each Instalment per \$1000

Or, the instalment payments may be taken in quarterly, semi-annual or annual payments, and the exact amount of the instalments will be furnished upon application to the Company.

Intermediate Policies.—The amount payable may be taken in 24 equal monthly instalments of \$21.28 per \$500 of insurance. Or, may be taken in 52 equal weekly instalments of \$9.68 per \$500 of insurance payable.

Ordinary and Intermediate Policies.—If one or more instalments under an Ordinary or Intermediate policy shall actually be paid in accordance with the provisions of any of the options above, and the beneficiary shall die before the remaining instalments shall have been paid, and there be no contingent beneficiary designated, the unpaid instalments will be commuted at the rate of 3½ per cent. per annum compound interest, and paid in one sum to the executors or administrators of the person to whom the instalments are payable.

If the amount of insurance be payable in instalments, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will effect an increase in the instalments, but no dividend will be declared on instalments payable after the period fixed for instalments certain.

At the maturity of a regular Ordinary policy, the amount payable or any portion thereof, if not less than \$1,000, may be left in trust with the Company. This trust fund privilege does not form a part of Intermediate policies but will be allowed, provided the aggregate amount payable to one beneficiary under Intermediate or Ordinary policies, or both combined, is, at least, \$1,000. Interest at the rate of 3½ per cent. per annum, together with any dividends apportioned to the fund, will be paid. At the death of the owner, the fund will be paid to the executors or administrators of that person.

The above-mentioned options are not available if the beneficiary be a corporation or firm, nor will monthly instalments be paid if the amount of each instalment be less than \$10.



THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Incorporated under the laws of the State of New Jersey

FORREST F. DRYDEN, President

HOME OFFICE, NEWARK, NEW JERSEY

ATTENDING PHYSICIAN'S STATEMENT

This certificate must be filled in by the physician in his own handwriting.

1 Full name of deceased—insured.	Y u e n T a i K a m
2 Date of Death.	Feb. 5, 1923.
3 Married or single?	Married
4 Place of death (give street, number, city or town, and state).	Leahi Home, Honolulu, T. H.
5 What have been insured's several occupations?	Bookkeeper. Ass't Manager of Fong Inn Co.
6 Correct age at death.	28 yrs on June 12th 1922 -
7 How long had you known insured?	Since Oct. 21, 1922.
8 How long had you been the medical attendant or adviser of insured?	From Oct. 21, 1922 to Feb. 5, 1923.
9 Were you consulted or did you give treatment for any important ailment prior to last illness? If so, give dates and particulars of disease.	No.
10 When were you first consulted regarding the impairment of health which, directly or indirectly, caused death?	Oct. 21, 1922.
11 At the time you were first consulted, how far advanced was the disease causing death and what was its duration?	Far advanced - Both lungs being seriously involved.
12 From history obtained give the date of inception of the disease that caused death.	June ? , 1922
13 Date of last treatment.	Feb. 5, 1923.
14 Did you see body of deceased?	Yes
15 State explicitly the immediate cause of death.	Tuberculosis Pulmonalis
16 State the contributing causes of death.	Emaciation, general weakness, - Cardiac & otheru
17 If death was due to accident, suicide or homicide, please state method.	-
18 Was death caused, directly or indirectly, by intemperance or any pernicious habit?	no
19 Did deceased have consumption?	Yes
20 Had any other physician been consulted before you or was any associated with you during the last illness? If so, give names and addresses.	Yes - Dr. A. V. Sinclair - Emma St, Honolulu Dr. F. K. Lam - McCandless Bldg. r 1 & 3
21 Was there a post-mortem examination?	no
22 Was there a coroner's inquest held?	no
23 State fully and particularly any other facts or circumstances within your knowledge bearing on the case. (If more space is needed for reply, use reverse side.)	Patient stated that he had been troubled with bronchitis (?) some little before he really became seriously ill.
24 When and where did you receive your medical diploma?	College of Phys. & Surgeons, Univ. of So. Calif. Los Angeles June 19, 1918.
25 How long have you been engaged in practice?	Since June 19, 1919.

Signed C. A. Saunders, M. D.

Office address Leahi Home

(Street and Number)

Honolulu, T. H.

(City or Town and State)

Terr. of Hawaii.

City Honolulu

County of Honolulu

ss.:

On this 10 th

day of

February

1923, personally appeared before me the above

named Dr. C. A. Saunders.

, who subscribed the foregoing statement before me and made

oath that the foregoing answers are each and all true.

(SEAL)

Robert Syers Anderson

APR 5 1923
ORDINARY
CLAIM

Notary Public, 1st Judicial Circuit, Terr. of

Hawaii.

This statement must be sworn to before an officer authorized by law to administer oaths, who must affix his seal and give the date of expiration of his commission. If the official has no seal, his authority and the genuineness of his signature must be attested by the clerk of the court of record.



DEFENDANT'S EXHIBIT No. 7.

III.

That subsequent to the death of Yuen Tai Kan, named as the insured in said policy of insurance, on the 7th day of April 1922 and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan named in said policy as beneficiary thereunder, that it refused to recognize said policy as valid because of false and erroneous statements made by the insured upon his examination by the medical examiner for defendant, prior to the issuance of said policy and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premiums under said policy, which tender was refused by the said Chun Ngit Ngan and did demand a return of said policy by said Chun Ngit Ngan to the defendant.

L.—No. 10307. Defendant's Exhibit 7. Filed May 5, 1924. William Hoopai, Clerk.

No. 1556. Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [90]

[Title of Cause.]

ORDER FIXING TIME OF TRIAL.

Monday, April 21, 1924, 2 P. M.

E. H. BEEBE, Esq. (T. C. B.), Attorney for Plaintiff.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney for Defense.

By agreement of respective counsel the above-entitled cause is set for trial at 2 o'clock P. M., May 2, 1924.

AFTERNOON SESSION—2 o'clock P. M.

Present: Hon. JAS. J. BANKS and Third Judge Presiding.

WILLIAM HOOPAI, Clerk.

J. L. HORNER, Reporter.

[Title of Cause.]

TRIAL.

Trial Jury Waived.

E. A. BEEBE, Esq. (T. C. B.), Attorney for Plaintiff.

SANFORD B. D. DOLE, Esq. (T. C. B.), Attorney for Plaintiff.

F. M. PROSSER, Esq., (F. P. A. M.), Attorney for Defendant.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney for Defendant.

Both parties being ready to proceed with trial in the above-entitled cause, Mr. *BeBee* after making

statement to the Court offered in evidence Insurance Policy of Yuen Tai Kam for \$5,000.00 and by order of the Court was received and marked Plaintiff's Exhibit "A."

At 2:10 P. M., the defense rested.

Mr. Prosser after statement to the Court offered the following in evidence:

Application of Yuen Tai Kam for Insurance in the Prudential Insurance Company of America No. 3955636, by order of the Court was received and marked Defendant's Exhibit 1.

Declaration signed by Yuen Tai Kam made to the Medical Examiner, by order of the Court was received and marked Defendant's Exhibit 2.

Stipulation as to Dr. Iga Mori, Dated April 1924, by order of the Court was received and marked Defendant's Exhibit 3. L.—No. 10307.

Stipulation re Testimony of Dr. Ed. De Meglio as a witness on behalf of the defendant, by order of the Court was received and marks Defendant's Exhibit 4. L.—No. 10307. [91]

The defendant called as a witness Glenn L. McTargart, who was duly sworn and testified.

The defendant offered in evidence a cablegram in re rejection of Kam Claim—date April 4, 1923, signed Prudential, by order of the Court was received and marked Defendant's Exhibit 5.

The defendant called as a witness Chun Tai Sung, who was duly sworn and testified.

The defendant called as a witness, Alfred L. Lange, who was duly sworn and testified.

The Court ordered the further trial of this case continued until Monday May 5th, 1924, at 2 o'clock P. M.

At 3 o'clock P. M., the court adjourned at term.
By order of the Court.

WILLIAM HOOPAI,
Clerk.

Monday, May 5, 1924.

[Title of Cause.]

FURTHER TRIAL.

EUGENE H. BEEBE, Esq., T. C. B., Attorney for
Plaintiff.

SANFORD B. D. WOOD, Esq., Assisting Attorney
for Plaintiff.

F. M. PROSSER, Esq., (F. P. A. M.), Attorney
for Defendant.

Both parties being ready to proceed with the trial in the above-entitled cause, Mr. Prosser recalled Mr. McTaggart, already sworn for further testimony.

The following witnesses were called by the defendant, duly sworn and testified:

4. Dr. F. F. Hedemann.
5. Dr. Wah Kai Cahg.
6. Dr. Howard Clarke.

The defendant offered in evidence a newspaper print picture of the Yuen Tai Kam, and by order of the Court was received and marked Defendant's Exhibit 6.

The defendant called as a witness (7) Dr. H. L. Arnold, who was duly sworn and testified.

The defendant offered in evidence an amendment, Sec. III, to its answer, which by order of the Court was received and marked Defendant's Exhibit 7.

At 3:00 o'clock P. M. both parties rested, and the Court ordered that the argument be had 9 o'clock A. M. to-morrow. [92]

Tuesday, May 6th, 1924.

Court convened at term at 9 o'clock A. M.

Present: Hon. JAS. J. BANKS, Third Judge
Presiding.

WILLIAM HOOPAI, Clerk.

J. L. HORNER, Reporter.

[Title of Cause.]

TRIAL (CONTINUED).

EUGENE H. BEEBE, Esq. (T. C. B.), Attorney
for Plaintiff.

SANFORD B. D. WOOD, Esq. (T. C. B.) As-
sisting Atty. for Plaintiff.

F. M. PROSSER, Esq. (F. P. A. M.), Attorney for
Defendant.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney
for Defendant.

Mr. Prosser offered in evidence the original proof of claim together with the attending Physician's Statement and asked that it be marked the same as the newspaper photo of Yuen Tai Kam. The Court ordered that the same be received in evi-

dence and marked Defendant's Exhibit 6.

Mr. Beebe then argued to the Court and quoting several authorities.

At 10:05 o'clock A. M. Mr. Prosser argued.

At 10:30 o'clock A. M. the Court took a recess.

At 10:40 o'clock A. M., the Court resumed, and Mr. Prosser continuing his argument, also quoting certain authorities.

At 11:05 o'clock A. M., Mr. Beebe made his closing argument.

At 11:10 o'clock A. M., the Court adjourned taking the matter under advisement.

By order of the Court,

WILLIAM HOOPAI,

Clerk. [93]

In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Application for Writ of Error. Filed May 19, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. [94]

[Title of Court and Cause.]

APPLICATION FOR WRIT OF ERROR.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled cause to the Clerk of the Circuit Court, of the First Judicial Circuit, Territory of Hawaii, on behalf of The Prudential Insurance Company of America, defendant and plaintiff in error, returnable to the Supreme Court.

Dated at Honolulu, T. H. May 19th, 1924.

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &
MARX,

Its Attorneys. [95]

In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Assignment of Error. Filed May 18, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H.,

Attorneys for Defendant and Plaintiff in Error.
[96]

[Title of Court and Cause.]

ASSIGNMENT OF ERROR.

Now comes The Prudential Insurance Company of America, defendant above named and petitioner for writ of error in the above-entitled cause and says that in the records, proceedings, judgments, decisions, rulings, orders and final judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in an action lately pending in said Circuit Court, wherein your petitioner was and is defendant and Chun Ngit Ngan was and is plaintiff, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of error upon which it relies, as, to wit:

ASSIGNMENT OF ERROR No. 1.

That the Circuit Court erred in rendering and filing the decision in the above-entitled cause and in holding and deciding as a matter of law that a tender back of the premium of insurance and a demand for the return of the policy coupled with a notification that the defendant refused to pay said policy on the ground of fraudulent and untruthful statements made to the examining physician of the Company, [97] which tender, demand of return of the policy and notification of the grounds therefor, were made to the plaintiff, she being the bene-

ficiary named in said policy, within the contestable period named in said policy, was not a sufficient contest under the terms of said policy and under the law, to which said decision defendant through its counsel excepted, which exception was allowed.

ASSIGNMENT OF ERROR No. 2.

That the Circuit Court erred in rendering and filing its judgment in the above-entitled cause dated the 12th day of May, 1924, as follows:

“In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

L—No. 10307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

JUDGMENT.

Pursuant to the decision duly rendered and filed herein,—

IT IS THE ORDER AND JUDGMENT OF THIS COURT, that the plaintiff, Chung Ngit Ngan, do have and recover of the defendant, The Prudential Insurance Company of America, the sum of Five Thousand Five Hundred Three and 33/100 Dollars (\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May,
A. D. 1924.

[Seal of Court.] (Sd.) JAS. J. BANKS,
Third Judge of the Circuit Court, First Judicial
Circuit, Territory of Hawaii." [98]
to which rendition and filing defendant by its coun-
sel duly excepted, which exception was allowed.

Dated, Honolulu, May 19th, 1924.

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &
MARX,

Its Attorneys. [99]

In the Supreme Court of the Territory of Hawaii.
October, 1923, Term. Error—No. 1556. From Cir-
cuit Court, First Circuit. Judge James J. Banks.
Chun Ngit Ngan, Plaintiff and Defendant in Error,
vs. The Prudential Insurance Company of America,
a New Jersey Corporation, Defendant and Plaintiff
in Error. Bond on Writ of Error. Filed May 19,
1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk.
Frear, Prosser, Anderson & Marx, 507 Stangenwald
Building, Honolulu, T. H., Attorneys for Defendant
and Plaintiff in Error. [100]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:
That the Prudential Insurance Company of America as principal and the National Surety Company as surety are held and firmly bound unto Chun Ngit Nagn, plaintiff and defendant in error above named and her personal representatives in the sum of Six Thousand Dollars (\$6,000), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves and our successors jointly, severally and firmly by these presents.

Sealed with our seals, and dated this 19th day of May, 1924.

The condition of the above obligation is such that whereas the said Chun Ngit Ngan, plaintiff and defendant in error above named, did recover a judgment against the above-bonded The Prudential Insurance Company of America in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, on the twelfth day of May, 1924, in words and figures as follows: [101]

“JUDGMENT.

Pursuant to the Decision duly rendered and filed herein,—

IT IS THE ORDER AND JUDGMENT OF THIS COURT, that the plaintiff, Chun Ngit Ngan, do have and recover of the defendant, The Prudential Insurance Company of America, the sum of

Five Thousand Five Hundred Three and 33/100 Dollars (\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May, A. D., 1924.

(Sd.) JAS. J. BANKS,
Third Judge of the Circuit Court, First Judicial
Circuit, Territory of Hawaii.''

From which said judgment the said named principal obligor has prosecuted a writ or error from the Supreme Court of the Territory of Hawaii to said Circuit Court.

NOW, THEREFORE, if the said The Prudential Insurance Company of America, principal obligor above named shall pay the judgment in said original cause in case of failure to sustain the writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

THE PRUDENTIAL INSURANCE COM-
PANY OF AMERICA.

Principal.
By HAWAIIAN TRUST COMPANY,
LIMITED.

Its Agent.
By A. S. DAVIS.

Its Vice-President.
By P. K. McLEAN. (Seal)
Its Vice-President.

Surety.
By GLEN A. McTAGGART,
Its Attorney in Fact.

By W. F. JAMIESON, (Seal)
Its Attorney in Fact.

O. K. as to form.

THOMPSON, CATHCART & BEEBE,
Per E. H. BEEBE. [102]

In the Supreme Court of the Territory of Hawaii October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Writ of Error. Filed May 19, 1924, and Issued Same at 3:22 o'clock P. M. J. A. Thompson, Clerk. Returned June 23, 1924, at 3:10 P. M. Robert Parker, Jr., Assistant Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. Filed at 4 o'clock P. M., May 19, 1924. Sibyl Davis, Clerk. [103]

[Title of Court and Cause.]

WRIT OF ERROR.

The Territory of Hawaii, To the Clerk of the Circuit Court, of the First Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of said The Prudential Insurance Company of America, defendant and plaintiff in error above named, for a writ of error in the above-entitled cause, you are commanded forthwith to send to the Supreme Court the record in said case.

WITNESS the Honorable EMIL C. PETERS,
Chief Justice of the Supreme Court, this 19th day
of May, 1924.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court, Territory of Hawaii.
[104]

[Title of Court and Cause.]

RETURN.

To the Clerk of the Supreme Court:

The execution of the within writ appears by the
record hereto annexed.

Dated, Honolulu, T. H., June 23, 1924.

SIBYL DAVIS,
Clerk of the Circuit Court of the First Judicial Cir-
cuit, Territory of Hawaii. [105]

In the Supreme Court of the Territory of Hawaii
October, 1923, Term. Error—No. 1556. From Cir-
cuit Court, First Circuit. Judge James J. Banks.
Chun Ngit Ngan, Plaintiff and Defendant in Error,
vs. The Prudential Insurance Company of America,
a New Jersey Corporation, Defendant and Plaintiff
in Error. Notice of Issuance of Writ of Error.
Filed May 19, 1924, at 3:22 o'clock P. M. J. A.
Thompson, Clerk. Issued for service May 20, 1924,
at 7:50 A. M. J. A. Thompson, Clerk. Returned
May 20, 1924, at 11:05 A. M. J. A. Thompson,
Clerk. Frear, Prosser, Anderson & Marx, 507
Stangenwald Building, Honolulu, T. H., Attorneys
for Defendant and Plaintiff in Error. [106]

[Title of Court and Cause.]

NOTICE OF ISSUANCE OF WRIT OF ERROR.

To the Above-named Plaintiff and Defendant in Error and to Messrs. Thompson, Cathcart & Beebe, her attorneys.

You, and each of you, will please take notice that a writ of error has issued from the Supreme Court of the Territory of Hawaii to the Circuit Court of the First Judicial Circuit, of the Territory of Hawaii, in the action lately pending therein in which The Prudential Insurance Company of America was defendant and said Chun Ngit Ngan was plaintiff, numbered and docketed in said court as Law No. 10307.

Dated, Honolulu this 19th day of May, 1924.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant and Plaintiff in Error.

By FREAR, PROSSER, ANDERSON & MARX,

Its Attorneys. [107]

In the Supreme Court of the Territory of Hawaii. October 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Praecipe. Filed

May 19, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. [108]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii, the record in the above-entitled cause, including the documents hereinafter referred to: The amended complaint and summons, defendant's amended answer to said amended complaint, decision of the court and judgment entered thereon, the exception thereto filed by defendant, the stenographer's transcript of the evidence adduced at the trial of said action, together with all exceptions noted by the plaintiff in error, the Clerk's minutes in said court and cause and all exhibits received during said trial of said action.

Dated, Honolulu, May 19th, 1924.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant and Plaintiff in Error.

By FREAR, PROSSER, ANDERSON & MARX, Its Attorneys. [109]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1924. Error to Circuit Court, First Circuit. Chun Ngit Ngan vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed December 11, 1924, at 1:55 P. M. J. A. Thompson, Clerk. [110]

[Title of Court and Cause.]

Error to Circuit Court First Circuit.

Hon. J. J. BANKS, Judge.

Argued November 1, 1924.

Decided December 11, 1924.

PETERS, C. J. PERRY and LINDSAY, JJ.

Insurance—Contract and policy—Clause of incontestability.

When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud, even though the policy contains a clause that it shall be incontest-

able after one year from its date of issue and even though the company did not within the period of one year institute *judicial* proceedings to cancel the policy on the ground of fraud. [111]

OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

This is an action at law to recover the sum of \$5,000 and interest upon a policy of insurance. The policy was issued on May 1, 1922, and the assured died of tuberculosis on February 5, 1923; at Leahi Home, an institution for the care of persons so afflicted. This action by the beneficiary, to recover the amount of the insurance provided for in the policy, was commenced in June, 1924, more than one year after its issuance. The policy sued upon contains a provision that it shall be "incontestable after one year from its date, except for nonpayment of premium." In connection with his application for the policy the assured represented to the insurance company that he did not suffer from certain ailments mentioned in the application and in the examination by the company's physician and that he had not within a stated period last past consulted any physician with reference to any such ailment. There representations were untrue in fact. They were material and were relied upon by the examining physician and the insurance company in concluding to issue the policy. The insurance company did not, within one year from the date of the policy, institute any judicial pro-

ceedings to test the validity of the policy; but on April 7, 1924, after the death of the assured and within the period of one year from the issuance of the policy, it made a tender to the sole beneficiary named in the policy of the amount which it had received as the first premium from the assured, notified the beneficiary of the misrepresentations of the assured and of the fact that it considered the policy invalidated by the fraud and that it refused to be bound by the policy or to pay the amount of the insurance covered thereby and demanded the return of the policy. In its defense in the present action, the company proved these facts, including the fraud, by undisputed evidence and they were in substance found to be true by the trial court. That court, however, held that, because of the clause relating to incontestability [112] the fraud could not now be availed of as a defense in this case and gave judgment for the plaintiff for the sum of \$5,503.33, including principal and interest to date of judgment.

The only question presented by the parties for our consideration on this appeal is whether under the above-recited circumstances the clause relating to incontestability renders it impossible for the insurer to avail himself in this action of the defense of fraud and invalidity. Stated in another way, the sole question is whether the steps taken by the insurance company within the year were such as to authorize the company to present them by way of defense to the present action brought by the beneficiary.

The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance. S. L. 1917, Act 115, sec. 50, subd. 3. See, for example, *Ebner vs. Ins. Co.*, 121 N. E. (Ind.) 315, 319. The language under these circumstances is deemed not to be that of the insurance company.

Another rule of construction, well settled in this jurisdiction, is that the words in an insurance contract "should be given their ordinary and popularly accepted meaning in the absence of anything to show that they were used in a different sense." *Alexander vs. Home Ins. Co.*, 27 Haw. 326, 328.

In our opinion the steps shown by the undisputed evidence to have been taken within the first year by the insurance company constituted a "contest" of the policy and render the defense of fraud available in the present action. [113]

1. The ordinary everyday meaning of the word "incontestable" leads to this conclusion. Nor is there any difficulty in ascertaining what that ordinary meaning is. The men who, because of the superiority of their knowledge of the English language, were chosen to prepare our dictionaries are all agreed on the subject.

“Incontestable. Not admitting of debate or controversy; * * * incontrovertible; as, incontestable facts or testimony.

“Synonyms: * * * incontrovertible; indisputable; * * * unassailable.” Standard Dict.

“Contest. To contend; to contend about in argument, especially in opposition; dispute; challenge; call in question; litigate.” Standard Dict.

“Incontestable. Not contestable; not admitting of dispute or debate; * * * incontrovertible; indisputable.

“Our own being furnishes us with an evident and incontestable proof of a Deity.

“Synonym: Indisputable; indubitable.” Cent. Dict.

“Contestable. That may be disputed or debated; disputable; controvertible.” Cent. Dict.

“Contestant. One who contests; a disputant; a litigant.” Cent. Dict.

“Contest, v. To argue in opposition to; controvert; litigate; oppose; call in question; challenge; dispute; as, * * * his right to the property was contested in the courts.” Cent. Dict.

“Incontestable. Not contestable; not to be disputed, called in question, or controverted; incontrovertible; indisputable; as, incontestable evidence.

“Specif., insurance, such by its terms that payment in case of loss cannot be disputed by

the company for any cause except nonpayment of premiums;—said of a policy.

“Synonyms: Incontrovertible; indisputable; irrefragable; undeniable; unquestionable.” Webster’s New Int. Dict.

“Contest, v. To make a subject of dispute, contention or emulation; * * * to call in question; to controvert; oppose; dispute.

“Synonyms: Dispute; controvert; debate; litigate; oppose; argue; contend.” Webster’s New Int. Dict.

“Incontestable. Incontrovertible; indisputable; not contestable; not to be disputed; that which cannot be called in question or controverted.” 31 C. J. 405, 406.

“Contest. The primary meaning of the verb ‘to contest’ is to make a subject of dispute, contention, or litigation; to call in question; to controvert; to oppose; to dispute. It is further defined as meaning, to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by courts of law; to litigate.” 7 A. & E. Ency. L. 78.

None of the dictionaries contains the slightest suggestion that the only correct meaning of the verb “contest” is [114] to litigate in court or to oppose in court and not elsewhere. It can be used as meaning to dispute or oppose in court but that is not its only meaning. One of its well-known meanings is to dispute and to attack out of court. We reply upon these definitions. We believe that they are correct and that the ordinary meaning of

the word "incontestable" is "indisputable," "not to be disputed in any way" whether in court or out of court.

2. There is absolutely nothing in the policy to show that the word "incontestable" or its inferential antonym "contestable" was not used in its ordinary acceptance or was used only in its narrower meaning as importing a dispute or opposition or attack *in court*.

3. There is no provision in the policy to the effect that the "contest" which is permitted within the first year shall be by judicial proceedings only. The clause of incontestability was doubtless drawn by the ablest lawyers available to insurance companies—men who know the English language well and who were aware of the ordinary definitions given to the words "incontestable," "contestable" and "contest" in the dictionaries. When under these circumstances they saw fit to provide simply that after a stated period the policy should be "incontestable" without specifying that within that period the policy would be contestable *by judicial proceedings only*, the inference is certainly of the strongest that no such limitation was intended upon the methods open to the company within the period for contesting the policy.

4. The origin and the purpose of the clause of incontestability in policies are not open to doubt. Prospective applicants for insurance learned from the experience of those who had gone before them and from the frequency of attacks by insurers upon

[115] policies after the death of the insured, that after all there was not a great degree of certainty that after their deaths and after their self-denial for long periods of years in the payment of premiums the assurance of financial aid which was thought to be thereby conferred upon their children or other beneficiaries would be actually effectuated. Because of this uncertainty applications for policies became less frequent than could be desired by the insurance companies, hence the inclusion of clauses such as the one now under consideration whereby the companies waived the right which had been theirs to attack the validity of policies (except for one or two very limited causes) after the expiration of a short period, usually one or two years. This waiver brought to applicants the assurance that if an attack upon the policies for fraud or for causes other than the excepted ones was to be made it would be made within the very short period agreed upon and probably within the lives of the applicants and certainly while the evidence contradicting the alleged fraud or other ground of attack relied upon was still in existence and easily available to the insured or, in the event of his early death, to his beneficiaries. They could rest assured that such an attack, necessarily prompt, would be brought to their knowledge so that preparations could be made by them to meet it, either by judicial proceedings to perpetrate the evidence available or by a suit in equity to establish the validity of the policy or by an action at law to recover the value of the policy at the time of the repudiation

or by an action at law to recover the total amount of insurance after the death of the insured or by acquiescence in the repudiation, acceptance of the premium returned and the securing of insurance from some other company. This history is recognized and these purposes are fully subserved by reading the permitted [116] contestability (within the prescribed period) as referring to a contest or dispute *in pais* as well as to a dispute or contest in the courts.

5. As the word "incontestable" is undoubtedly used in the policy as meaning indisputable "in any way whatsoever," i. e., in court or out of court, so also the inferential antonym "contestable" means disputable by any or every method which constitutes a dispute or attack, i. e., in court or out of court.

6. The clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period. As to the latter, the rights of the insurer are as broad as they would have been if the clause of incontestability were not in the policy. Without that clause those rights for the first year would certainly have included the right to dispute or attack out of court as well as to dispute or attack in court.

7. There is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates *how* it may be contested within the year. Even the advocates of the sole judicial contest theory do not claim that the judi-

cial proceedings must terminate in a decree or decision within the prescribed period. According to their view the filing of the suit and the service of summons on the last day of the prescribed period would constitute a contest such as would satisfy the requirements of the policy. If this is so, and undoubtedly it is, then the only purpose which could possibly be subserved by the mere institution of the judicial proceedings would be that the contest was *commenced*, that notice was thereby served upon the insured or his beneficiary, within the prescribed time, that he had a contest upon his hands and that he must ascertain, if he [117] will, what evidence is available to him and preserve it and perpetuate it as far as possible if he does not acquiesce in the repudiation. All of these purposes are as well served by a contest or dispute out of court as by the judicial proceedings. If litigation after the expiration of the one year is not in violation of the policy, as it is not, merely because the judicial proceeding was instituted within the one year, then so also litigation after the one year is not in violation of the policy where it is in continuance or development of the contest *in pais* which was started before the expiration of the period. Of course, by the clause as to incontestability it was not contemplated by any of the parties to this contract that litigation after the one year could not be had. It is always possible for parties to litigate although it is not always possible for them to succeed; and it is permissible and correct that

there should be litigation after the prescribed period to establish rights which accrued and became fixed within the period.

8. Under the very clause of incontestability now under consideration it is entirely clear that the policy is contestable, for nonpayment of premiums, even after the first year. Do advocates of the opposing theory mean that after the first year the only way in which the company can "contest" the policy is judicially? Such a contention would be wholly unsupportable. A repudiation by acts and words out of court would clearly suffice, throwing the burden upon the beneficiary or the insured, as the case might be, of suing if he wished to do so. If this is so in the respects in which the policy is contestable after one year, why is it not equally so in the respects in which it is contestable during the first year? We think that it is.

In holding as we do, we appreciate that in point of [118] numbers the authorities are overwhelmingly against us; but with all respect, we think that, in reason, they are not.

The case of *Mut. Life Ins. Co. of New York vs. Hurni Pkg. Co.*, 263 U. S. 167, is cited by the insurance company as sustaining its contention. If it were a decision on the point, our duty in the case at bar would be greatly simplified but we cannot find that in that case the Court expressed any view upon the point now under consideration. What it held was that the "date of issue" referred to in the clause of incontestability in the policy then before the Court was the one speci-

fied in the policy "although this (by agreement of the parties) was earlier than the dates of actual execution and delivery,"—question entirely different from that now before us.

In the same case upon a second trial (280 Fed. 18, 20) the lower Court said: "We are equally of opinion that a repudiation of the claim of defendant in error" (the beneficiary) "such as that made in the letter of August 24th" (the steps taken by way of repudiation were wholly out of court) "was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend." While this is an adjudication in favor of our construction of the policy, the reasoning which moved the Court is not set forth in the opinion.

The only well-reasoned opinion which has come to our attention in support of the view that a non-judicial contest within the prescribed period will suffice to protect the rights of the insurance company is that of Judge Cochran of the United States District Court, reported in *Mut. Life Ins. Co. of New York vs. Rose*, 294 Fed. 122, at pages 132, 133 and 134. In that case the insurer after the expiration of the period named in the incontestability [119] clause brought suit to cancel the policy on the ground of fraud. Within the time limited it had repudiated the policy, tendered the premium to the insured and demanded a return of the policy. The suit was brought in the lifetime of the insurer. The question as stated

by the Court was, "whether, if a policy of insurance has been rescinded for fraud in the way thus pointed out, during the period of contestability, may not such rescission be relied on as a ground of a suit in equity to cancel the policy, brought after the expiration of such period, or may it be pleaded as a defense to a suit brought on the policy after the expiration of such a period?" The question was answered by the Court in the affirmative. It may be that in one respect as to the facts that case differs from the case at bar, for in that case the tender of the premiums already paid was made to the insured himself and from him the return of the policy was demanded. In the case at bar the tender would seem to have been made to the wrong party. The estate of the decedent and not the beneficiary of the policy was entitled to a return of the premium. Nevertheless it is far from clear that a tender of the premium was necessary in the case at bar in order to constitute a rescission *in pais* by the act of one party alone, to wit, the insurance company. A tender to the beneficiary certainly was not necessary, because she was not entitled to it. A tender to the administrator was probably not a prerequisite to a rescission as against the beneficiary, particularly in view of the undisputed evidence that by its acts the insurance company made clear that it was not endeavoring to retain the premium while cancelling the policy. It was obviously anxious to return the premium to the person entitled to it. Again, it does not appear from

the record that any administrator of the estate was ever appointed and in the absence of such an [120] appointment there could be no tender to anyone representing the estate of the decedent. If a tender to the beneficiary was not under the circumstances of this case a prerequisite to a completed rescission by the insurance company alone, the Rose case is parallel in its facts to the case at bar. However that may be and even assuming that a tender was an essential prerequisite and that there was no completed rescission by the insurance company, nevertheless it remains true that the Rose case is a direct authority to the effect that a nonjudicial contest within the year will suffice to meet the requirements of the policy and will justify the insurance company in pleading that contest as a defense to an action upon the policy brought by the beneficiary after the lapse of the prescribed period. The Court held, after a careful consideration of the facts and the law, that the steps taken by the insurance company within the year, to wit, the tender, the repudiation on the ground of fraud and the demand for the policy, while they were admittedly not a judicial contest, nevertheless constituted a "contest" and were available in defense to the action at law brought by the beneficiary after the prescribed time limit.

Once it is held or admitted that *some* acts out of court may constitute a contest within the inferential contestability provision of the contract then the judicial nature of the dispute can no longer

be said to be the boundary or line of demarcation between a sufficient contest and an insufficient contest. One set of facts *in pais* is just as good as another set of facts *in pais* provided it constitutes an attack on the policy or a dispute. In this connection it must always be borne in mind that the ultimate test to be considered is not whether there has been a "rescission" but whether there has been a "contest." The word [121] "rescission" does not appear in the clause under consideration or anywhere else in the contract in connection with this same subject. The fact that the company had gone so far in the Rose case as to make alone a completed rescission and cancellation of the fraudulent contract was a good reason for holding that the company had contested the validity of the policy within the prescribed period; but it does not follow that such a completed rescission is an indispensable and the only method of constituting a contest *in pais*.

A few comments will now be made with reference to the authorities holding that a judicial contest alone will suffice to protect the insurance company.

A writer in the Central Law Journal, Vol. 97, No. 3, after a review of the cases summarized his own reasoning in these words: "To give the word 'contest' the meaning insisted upon by the companies would be treating it as if the word 'dispute' had been used instead. The courts will not attribute to the parties, in the selection of the language used in the clause, a futile or a useless

purpose. The clause certainly was intended to mean something and was intended to be enforced. Certainly there would be no means of enforcing the contract if the word 'contest' means 'dispute.' No one could prevent the company, notwithstanding its contract, from disputing liability. * * * since contracts may only be enforced by the courts, * * * it is logical to conclude that the parties * * * had in mind a contest in a court of competent jurisdiction." The weakness of this reasoning is that it is equally true that if "contest" means only a *judicial* dispute, no one could prevent the company from instituting judicial proceedings and thus disputing liability.

Many of the courts base their construction of the clause in whole or in part upon the statement that the clause is "a statute [122] of repose and limitation." To a certain extent, it is; but only to the extent indicated by the language of the provision. In other words, the mere thought that the provision was intended as an assurance of repose and limitation of the company's rights does not throw light upon the meaning of the words "incontestable," "contestable" or "contest." Under our view, as well as under the opposing view, the clause is similiar to a statute of repose and limitation. By it, under our view, the company waives and abandons certain rights of dispute which it otherwise would have had beyond the prescribed period and is compelled to ascertain whether or not the policy was secured by fraud and to make its contest or dispute of the policy and necessarily to inform

the insured or the beneficiary, as the case may be, of its repudiation, opposition and attack upon the policy,—all within the time limited. In other cases, as for example, *Am. Trust Co. vs. Life Ins. Co.*, 92 S. E. (N. C.) 706, 711, and *Thistle vs. Ins. Co.*, 261 S. W. (Tenn.) 667, repudiation, notice and tender, not acquiesced in by the insured, were held not to constitute a rescission or cancellation. It is there said that it takes two to rescind or cancel a contract and that if two will not agree to a rescission, then the only recourse is to a judicial tribunal having jurisdiction to annul and that, therefore, a judicial proceeding must be instituted by the insurer within the period of contestability. These arguments presuppose that a rescission is an essential part of a contest or at least proceed on the theory that the test is whether there has been a rescission rather than whether there has been a contest. It would seem to be too obvious to require further comment that a rescission is not an essential ingredient of a contest. In a contract for the sale of goods, payment is demanded. It is refused, not on the ground of fraud but on the sole [123] ground that the purchase price has already been paid in full in coin. Under a building contract demand is made for the erection of servants' quarters. Performance is refused, not on the ground of fraud, but on the sole ground that such erection is not required by the terms of the contract. In neither instance is there a rescission and yet in both instances the contest

is on in full force whether the refusal is conveyed by mere words out of court or in a formal answer in court. Moreover it does not always take two to effectuate a rescission of a contract for fraud. One alone can do so as pointed out by Bigelow on Fraud in passages quoted by Judge Cochran in *Mut. Life Ins. Co. vs. Rose*, *supra*, at page 132.

Other decisions, like that in *Insurance Co. vs. Cranford*, 257 S. W. (Ark.) 66, are based solely upon precedents, upon the plea that there should be uniformity in policies of insurance both in form and in the interpretation of the language given. The authorities in favor of the judicial contest view are not in any proper sense to be regarded as a rule of property and if they are in error there is no good reason why the error should not now be departed from and correct principles adopted.

In a number of cases it is said that under the clause of incontestability, the insurance company must within the time limited make a defense to an action of the policy "or take affirmative action,"—without defining what that affirmative action should be. We do not understand that this is in itself a statement of any reason for holding that the contest required can be a judicial one only. It is at most a statement of that conclusion. If by affirmative action is meant any action in court or out of court, we agree with the statement; but if, as is probable, affirmative action *in court only* was intended, we think that the conclusion [124] is correct, for the reasons outlined above.

Still other cases, like that in 203 Pac. (Okl.) 192, held that the word "contest" presupposes that the struggle will be before some tribunal with power to determine it and dispose of it. We do not understand this to be an element in the meaning of the word. None of the lexicographers speak of it as a necessary element while all recognize by the meanings given that the word can refer to and include a contest or dispute out of court as well as a contest in court before a tribunal with power to decide it. To hold that under the policy before us in all cases of contestability the contest shall be had before a judicial tribunal would be adding to the policy a term or a condition not now contained therein.

In other instances, as for example, in the same Oklahoma case last referred to, it is said that the insurance company is not sole judge of the falsity of the answers or of the question whether a fraud was committed upon it by the assured and that, therefore, a judicial decision is necessary and a judicial contest is contemplated. Undoubtedly the insurance company is not the sole judge of the falsity of the representations made to it by the insured. That is as true when the claim or defense of fraud is presented in a judicial proceeding as it is when the claim is made out of court. Whether the insurance company makes its claim by bill in equity or by defense of an action at law or by steps taken out of court by way of repudiation of the policy, it is not attempting in any of those instances to set itself up as the judge of the fraud.

It is making its claim and in the making of it is presenting a dispute or contest; and that is all that the policy requires to be done within the period stated.

In still other cases, like 257 S. W. (Ark.) 66, 69, it is [125] said that "a contest in law implies an adversary proceeding in which matters in controversy may be settled by the courts upon issue joined." A sufficient answer to this is to say that the policy does not specify a contest in law and does not specify any particular mode of contest whatever. All that it says inferentially is that within the period named the policy shall be contestable.

In some of the cases it is said that the purpose of the clause is to force the raising and settlement of any issue (by way of attacking the policy) *during the assured's lifetime* and much is made of the point that after his death he cannot speak. But the contestability within the short period prescribed it not made to depend upon the continued existence of the insured. All of the modern cases are agreed on that point. The short period, whether one year or two years, of contestability is granted and reserved to the insurance company wholly irrespective of whether the insured lives during the whole of that period or dies the day after the policy is issued. The company still has in the latter instance the remainder of the period in which to conduct its investigation and to make its contest. It may have been thought in the framing of the provision that in all probability most of

the insured persons would survive the short period named and thus be able to take part themselves in preparing their defense to the charge of fraud; but it was doubtless also thought that even if he died within the period it was only the part of fairness to allow the insurance company at least the time named within which to search for and find the fault.

There are other cases which are sometimes cited in support of the view more favorable to the beneficiary but which in reality, while deciding other questions of construction, do not decide the question as to what manner of contest within the period will satisfy the requirements of the policy. One of these is *Wright vs. Mut. Ben. Assn.*, 43 Hun, 61, a case which has been often referred to in [126] later cases as the one in which the line of decision began to the effect that by contest is meant a judicial contest only. The case as we read it decides nothing of the sort and confines itself to a consideration and decision of other questions, one being whether the expression "no question as to the validity" was in terms broad enough to exclude the defense of fraud sought to be established and the other being "whether the provision so construed contravenes any rule of public policy and is for that reason void." The Court did say in the course of its discussion of the question of public policy: "The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer

must test, if ever, the validity of the policy"; but it did not express itself as to what manner of test would be necessary in such cases. The question of whether certain steps out of court could constitute a test within the meaning of a clause of incontestability did not arise upon the facts of that case and was not in any wise considered by the Court.

The judgment is set aside and a new trial granted.

M. F. PROSSER and A. E. STEADMAN
(FREAR, PROSSER, ANDERSON & MARX
and A. E. STEADMAN on the briefs), for
Plaintiff in Error.

E. H. BEEBE and MARGUERITE K. ASHFORD
(THOMPSON, CATHCART & BEEBE and
MARGUERITE K. ASHFORD on the brief),
for Defendant in Error.

ANTONIO PERRY.

ALEXANDER LINDSAY, Jr. [127]

DISSENTING OPINION OF PETERS, C. J.

On May 1, 1922, the Prudential Insurance Company of America issued to Yuen Tai Kan, the insured, its certain life insurance policy of even date wherein it agreed among other things that in the event and upon due proof of the death of said Yuen Tai Kan it would pay to Chun Ngit Ngan, the wife of the insured, as beneficiary, the sum of \$5,000. The policy contained the following incontestable clause: "This policy shall be incontestable after one

year from its date except for nonpayment of premium * * * .” The insured died February 5, 1923. On April 7, 1923, the agent of the insurance company notified the beneficiary, Chun Ngit Ngan, that it refused to be bound by the policy on the ground of fraud on the part of the assured in its procurement, requested of the beneficiary that she deliver the policy to it for cancellation and tendered her the full annual premium theretofore paid in advance by the assured. The request for cancellation was refused and the tender declined. Subsequent to May 1, 1923 (after one year from the date of the policy), the beneficiary brought an action at law against the insurer for the amount of the policy. The insurer by way of answer to the complaint of the beneficiary, in addition to the allegations of general denial and notice of the defense of fraud, specially answered as follows: “That subsequent to the death of Yuen Tai Kan, named as the insured in said policy of insurance, on the 7th day of April, 1923, and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan, named in said policy as beneficiary thereunder, that it refused to recognize such policy as valid because of false and erroneous statements made by the assured upon his examination by the medical examiner for defendant [128] prior to the issuance of said policy, and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premium under said policy, which tender was refused by the said Chun Ngit Ngan, and did demand a return of said policy by said Chun

Ngit Ngan to the defendant.” Trial was had jury waived on April 21, 1924. The beneficiary made out a *prima facie* case. The insurance company offered evidence tending to prove and the Court found that the policy had been procured by the assured by fraud. The Court, however, found for the beneficiary, holding that the policy by its terms was incontestable after one year from its date and a year having elapsed since the date of the policy the insurance company was foreclosed from defending against the policy on the ground of fraud and ordered that judgment be entered accordingly.

The insurance company prosecuted error, assigning the following errors: 1. “That the circuit court erred in rendering and filing the decision in the above-entitled cause and in holding and deciding as a matter of law that a tender back of the premium of insurance and a demand for the return of the policy coupled with a notification that the defendant refused to pay said policy on the ground of fraudulent and untruthful statements made to the examining physician of the company, which tender, demand of return of the policy and notification of the grounds therefor, were made to the plaintiff, she being the beneficiary named in said policy, within the contestable period named in said policy, was not a sufficient contest under the terms of said policy and under the law, to which said decision defendant through its counsel excepted, which exception was allowed.” 2. “That the circuit court erred in rendering and filing its judgment in the above-entitled cause dated the 12th day of May,

1924, as follows": (Here follows the judgment [129] in stereotyped form.)

No charge of fraud was made against the beneficiary in the procurement of the policy. It is admitted by the insurer that no other action was taken by it to cancel the policy except that of April 7, 1923.

The policy in clear and unambiguous terms prohibits the insurer from contesting the policy at any time after the expiration of one year from its date except for the nonpayment of premium. The full annual premium had been paid in advance so the exception is not involved. The action on the policy was brought by the beneficiary after the expiration of one year from the date of the policy. The answer of the insurer setting up the defense of fraud was necessarily filed after the expiration of one year from the date of the policy. Unquestionably the filing of the answer and setting up of the defense of fraud by the insurer in an action by the beneficiary upon the policy constitutes a contest. Hence the insurer by its answer is contesting the policy after the expiration of a year from its date in the face of and contrary to the express prohibition of the incontestable clause. Clearly the insurer is foreclosed from contesting the policy unless by its acts of repudiation of the policy of April 7, 1923, it is exempted from the operation of the incontestability clause.

The purpose of the incontestability clause is obvious. Fraud vitiates a contract but until some action is taken by the defrauded party thereto the

contract continues in existence. The contract is voidable and not void. It is upon the discovery of the fraud by the defrauded party that the necessity of determination arises—whether the defrauded party will continue with the contract or rescind for fraud. “The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that [130] the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the contract, and insist, if that is possible, on being put in the same position as if the representation had been true. Or he may at his option rescind the contract, and claim to be restored, so far as may be, to his former position within a reasonable time after discovering the misrepresentation * * * .” Wald’s *Pollock on Contracts*, marg. p. 576, top p. 705. Until the discovery of the fraud the defrauded party is not called upon to act. Hence it is that irrespective of the period of existence of the contract, if the defrauded party has been ignorant of the existence of the fraud, his prior acts of affirmation of the contract do not bar him from subsequently disaffirming it after the discovery of the fraud. The time of the discovery of the fraud is the turning point in the subsequent relations of the parties. In the absence of an incontestability clause a life insurance policy may be avoided by the insurer at any time so long as the acts of avoidance are taken within a reasonable time after the discovery of the fraud. But where a policy of life insurance contains an incontestability clause the

insurance company in effect waives its right of disaffirmance upon the discovery of the fraud if such disaffirmance is not undertaken prior to the incontestability clause coming into effect. Hence the authorities are uniform to the effect that incontestability clauses found in life insurance policies are in the nature of short statutes of limitation limiting the time within which the insurer may contest the policy. "The practical and intended effect of the stipulation is * * * to create a short statute of limitations in favor of the insured, within which [131] limited period the insurer must test, if ever, the validity of the policy." *Wright vs. Mutual Benefit Ass'n*, 43 Hun (N. Y.), 61 (1887), affirmed 118 N. Y. 237 (post). "While it is true that fraud voids all contracts, it is equally true that it is competent for the law-making power to fix a definite time in which an action shall be brought to declare a fraudulent contract void, and a failure on the part of the person defrauded to bring such action within the time designated would have the effect of debarring him from the right to set aside such a contract. While in such cases it is generally provided that the limitations so fixed shall not begin to operate in favor of the party who has committed the fraud until the same has been discovered, the duty is placed upon the party who seeks to avoid the contract on the ground of fraud to make such efforts to discover the fraud as would amount to ordinary diligence in law. Civ. Code, Secs. 3669, 3711-3785; *Little v. Reynolds* (Ga.), 28 S. E. 919, and cases cited. As the law may prescribe such a limitation in which actions shall be

brought by the party to be affected, it is also within the power of the contracting parties to agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law. *Telegraph Co. vs. James*, 90 Ga. 254, 16 S. E. 83; *Brown vs. Insurance Co.*, 24 Ga. 97; *Melson vs. Insurance Co.*, and *Maril vs. Same*, 97 Ga. 723, 25 S. E. 189; *Ritch vs. Association*, 99 Ga. 112, 25 S. E. 191. The period fixed by law being intended for the benefit of the parties interested in the contract, and for their protection, it is competent for them to stipulate that the time which the law gives them to act shall be shortened, on the one hand, or lengthened, on the other. Parties interested in the contract may waive the [132] benefit of the statute of limitations fixed by the law, the effect of the waiver being either to make a longer or shorter period than the law prescribes." *Mass. Ben. Life Ass'n vs. Robinson*, 30 S. E. (Ga.) 918, 925 (1898). "Incontestable provisions in insurance policies have been held valid as creating a short statute of limitations in favor of the insured; the purpose of such provisions being to fix a limited time within which the insurer must ascertain the truth of the representations made." *Monahan vs. Met. Life Ins. Co.*, 119 N. E. (Ill.) 68, 69 (1918). "(1) The plea alleges facts showing that the insured was guilty of intentional fraud in procuring the policy, and the demurrer admits them. It is an elementary rule of law that fraud vitiates all contracts, and therefore the contract was voidable by the company. When the insured died it had a complete defense to

any action on the policy which his representative might bring. The only question, therefore, is whether the company was still bound, after the death of the insured, by the limitation of one year from the date of issue of the policy in which to contest it. (2) We have held that the provision in a policy of life insurance that it shall be incontestable after one year from the date of its issue, provided the premiums are duly paid, is a valid provision, which bars the insurer from making any defense against the policy, after the expiration of the contestable period, except for nonpayment of premiums, and that after the lapse of that period even fraud in procuring the policy is not available to avoid it. *Royal Circle vs. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Flanigan vs. Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178; *Weil vs. Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915D, 974; *Mona-han vs. Metropolitan Life [133] Ins. Co.*, 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D, 1196. This is in accord with the substantially unanimous decisions of the courts which hold that the language admits of no reasonable construction other than that the company reserves to itself the right to ascertain all the matters and facts material to its risk and the validity of its contract for one year; and that, if within that time it does not ascertain all the facts and does not cancel and rescind the contract, it may not do so afterward upon any ground then in existence. When the execution of a contract has been procured by the fraud of one of the parties, the innocent party, upon discovering the fraud, may

still insist upon the contract or may rescind it. He must, however, if he desires to repudiate it, do so promptly upon discovering the fraud and consistently adhere to his intention. By delay or vacillation he waives his right to rescind. The effect of the stipulation in the policy is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, but its practical and intended effect is to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. *Wright vs. Mutual Benefit Life Ass'n*, 43 Hun (N. Y.), 61; *Id.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Massachusetts Benefit Life Ass'n vs. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Clement vs. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *American Trust Co. vs. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Murray vs. State Mutual Life Assurance Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *Mutual Life Ins. Co. vs. Buford*, 61 Okl. 158, 160 Pac. 928; *Metropolitan Life Ins. Co. vs. Peeler (Okl.)*, 176 Pac. 939, 6 A. L. R. 441." *Ramsay vs. Old [134] Colony Life Ins. Co.*, 131 N. E. (Ill.) 108, 109 (1921). "Payment was refused by the company on the ground that the insurance had been procured by false representations of a material character which had been made by the insured in his application for the purpose of procuring the policies of insurance. No answer was filed to the present suit within one year after the date of the insurance policies, and no suit has been brought by

the insurance company to set aside the contract of insurance because it had been procured by fraudulent representations on the part of the insured. Thus it will be seen that the sole issue raised by the appeal depends upon the construction to be given the incontestable clause which is set out in full in our statement of facts. In substance, it provides that policies shall be incontestable after one year if the premiums are duly paid, except for the violation of the provision relating to military or naval service in time of war. The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. It is said that the practical and intended effect of such a stipulation is to create a short statute of limitations. By the stipulation the insurance company agreed that it would take a year to investigate and determine whether it would contest the policies of insurance, and that, if it failed within that time to discover any grounds for contesting the same, it would make no further investigation and would not thereafter contest the validity of the policies." *Missouri State Life Ins. Co. vs. Cranford*, 257 S. W. (Ark.) 66, 67 (1923).

The question therefore arises as to what steps the insurer must take by way of disaffirmance to exempt it from the application of and the limitations imposed by the incontestability [135] clause of an insurance policy so that in the event of a suit by the beneficiary after the elapsation of the first

year of the policy there is available to it in such suit the defense of fraud.

The contention of the plaintiff in error is best understood by the following quoted excerpt from its brief; "It is uncontradicted by the evidence and so found by the trial court that the insurer upon learning of the fraud of insured and within a period of one year from the date of the policy, tendered to the beneficiary the premium which had been paid, demanded a surrender of the policy and notified the beneficiary that it did not recognize the policy as a valid contract and elected to rescind said policy because of the fraud of insured in the declarations to the medical examiner. The insurer took, therefore, within a period of one year all of the steps to renounce liability, rescind the contract and put the parties *in statu quo* which were possible outside of court."

This the plaintiff in error contends was a "contest" which exempted it from the application of the one-year incontestability clause and was sufficient to permit it, after one year from the date of the policy, to plead the fraud of the assured in an action at law brought by the beneficiary. Plaintiff in error rests its contention primarily upon two cases, namely, Life Insurance Co. vs. Hurni Packing Co., 280 Fed. 18, and Met. Life Ins. Co. vs. Rose 294 Fed. 122.

The Rose case depends for its conclusion upon the Hurni Packing Co. case and Jefferson Standard Life Ins. Co. vs. McIntyre, 285 Fed. 570. The Hurni Packing Co. case contains unsupported *dicta*

to the effect that a letter by the insurer to the beneficiary denying liability was a sufficient contest and that court proceedings were not essential to the right. [136] I do not consider this language persuasive. The Court did not deny that some affirmative action must be taken by the insurer to cancel the policy prior to the incontestability clause coming into effect. On the contrary it said: "Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy." But if the effect of the decision is that rescission may be taken personally against the beneficiary exclusive of the legal representatives of the assured the case was in my opinion incorrectly decided. Moreover, if this case holds that rescission by act of the insurer, without the concurrence of the assured, taken prior to the incontestability clause coming into effect, exempts the insurer from the application of such clause, it is contrary to the weight of Federal authority. See *N. W. Mutual Life Ins. Co. vs. Pickering* (Fifth Circuit Court of Appeals), 293 Fed. 496-499; *Jefferson Standard Life Ins. Co. vs. Keeton* (Fourth Circuit Court of Appeals), 293 Fed. 496-499; *Jefferson Standard Life Ins. Co. vs. McIntyre* (Fifth Circuit Court of Appeals), 294 Fed. 886, 887, all of which hold in effect that mere repudiation of a policy does not constitute a "contest."

The decision in the Keeton case is peculiarly interesting. There as here the policy contained a one-year incontestability clause. There similarly as here rescission by act of the insurer was at-

tempted against the beneficiary after the death of the insured but during the first year of the policy. If such rescission operated to cancel the policy, then the insurer could have within the decision of the Rose case availed itself of its rescission at law by way of defense to any action at law that the beneficiary might bring upon the policy. In other words, the insurer had a plain, adequate and [137] complete remedy at law. And yet the Court holds that the insurer has not an adequate remedy at law and entertains jurisdiction of a suit in equity for rescission. The reason for equitable interference is perfectly plain—that rescission by act of the insurer did not operate to cancel the policy and restore both parties thereto to their respective *statu quo ante* and that if the beneficiary delayed bringing suit at law until the expiration of the first year of the policy the attempted rescission *in pais* would not be available as a defense. There were the “peculiar circumstances” which rendered Insurance Co. vs. Bailey, 13 Wall. (U. S.) 616, and Cable vs. U. S. Life Ins. Co., 191 U. S. 288, inapplicable. The applicability of the Rose case is discussed later.

In the McIntyre case (285 Fed. 570), cited in the Rose case, the U. S. District Court of Florida held that mere denial of liability by the insurer to the beneficiary on the ground of the fraud of the assured made within the first year of the date of the policy exempted the insurer from the provisions of a one-year incontestability clause contained therein. This case, however, was reversed

by the Circuit Court of Appeals of the Fifth Circuit (294 Fed. 886), where the Court said: "A mere denial or repudiation by an insurer of its liability under a policy, accompanied by a tender of the premium paid, is not a contest within the meaning of such a provision as the one above set out. *Northwestern Mutual Life Ins. Co. vs. Pickering*, 293 Fed. 496, in the United States Circuit Court of Appeals, Fifth Circuit, present term. The provision in a life insurance policy that 'this policy shall be incontestable, except for nonpayment of premiums, provided two years shall have elapsed from its date of issue,' has the effect of making the policy incontestable, on a ground other than the excepted one, by the insurer after two years from its date of issue, though the [138] insured died within that time. *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.* (November 12, 1923), 44 Sup. Ct. 90, 68 L. Ed.—. We think that the reasons stated in support of the conclusion reached in the last-cited case are applicable to the provision now in question. The contested policies did not cease to be in force upon the death of the insured. The contracts remained in force, upon the death of the insured immediately insuring to the benefit of the beneficiaries."

The overwhelming weight of authority is to the effect that in order that an insurance company may defend at law against an insurance policy containing a one-year incontestability clause after such clause has come into effect it must have during the first year of the life of the policy taken some step,

the immediate or ultimate legal effect of which is to cancel the policy within the first year of its life or to render it within that time of no further force or effect. The majority opinion recognizes the weight of authority but refuses to be guided by it.

The following excerpts from some of the State and Federal decisions are illustrative:

“An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a *defense* the falsity of the representations of the insured. But its effect is not to prevent the insurer from *annulling the contract* upon the ground of the fraudulent representations of the insured, provided *an action* for that purpose is brought in the lifetime of the insured and within two years from the date of the policy.” Wright vs. Mutual Ben. Ass’n, 43 Hun, 61, 65 (1887). “ * * * it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations [139] and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which *to apply for redress* on account of it and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for

a shorter limitation thereon than that fixed by law and such an agreement is in accord with the policy of statutes of that character. (Wilkinson vs. First Nat. Fire Ins. Co., 72 N. Y. 499, 502.) No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years when in the end and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant instead of receiving the promised insurance may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not and never had an existence except in name." Wright vs. Mutual Ben. Ass'n, 118 N. Y. 237, 243 (1890). "It is true that fraud vitiates all agreements and undertakings based upon it, and they may be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and *upon the motion of the party defrauded*; but, under the provision in question, the party must within the year exercise his right *to repudiate and rescind it*. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defense to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is impractical to put any reasonable interpretation on it. Unless it is the object and purpose of the provision

[140] to cut off all defenses arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it. It has been well said: 'The effect of the provision is to prevent the insurer from interposing as a defense the falsity of the representations of the insured, which is fraud. But it does not prevent an abandonment, rescission and cancellation of the contract for such fraud provided the *action* for that purpose is brought within a year.' "

Clement vs. N. Y. Life Ins. Co., 46 S. W. (Tenn.) 561, 562 (1898). "The practical, and evidently the intended, effect of the stipulation in question was to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, *test* the validity of the policy."

Murray vs. State Mut. Life Ins. Co., 48 Atl. (R. I.) 800 (1901). "An examination of the following cases will show that the holding of the courts of this country has been, *almost universally*, that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost to the insurer if it fails to make the defense or *take affirmative action within the time limited by* the policy." Indiana etc. Life Ins. Co. vs. McGinnis, 101 N. E. (Ind.) 289 (1913). "The admissions in the answer show beyond question the issuance of the policy, payment, and proper tender of payment of the premiums thereon, death of the insured, notice to the company of such death, and refusal of the company to pay such policy, and that more than two years had elapsed since the

date of issue of the policy, and the defendant failing to show that within two years from the date of policy that legal action had been taken to avoid the policy on account of breaches of the warranties in the application for insurance, or that said policy had been cancelled with the assent [141] of the insured, the Court properly overruled defendant's demurrer to the evidence, correctly denied motion for a directed verdict for defendant, and properly directed a verdict for the plaintiff. * * * If the insurer desired to avoid the policy, on the ground of misrepresentations contained in the application for insurance, it should, in the absence of the consent on the part of the insured and the beneficiaries named in the policy, have taken *legal steps* to do so within two years from the date of issuance of the policy, and, failing so to do within two years from the date of the issue of the policy, the policy of insurance was incontestable on the ground of breaches of warranties contained in the application." *Mutual Life Ins. Co. vs. Buford*, 160 Pac. (Okl.) 928, 930, 931 (1916). "One year is given to the defendant to make inquiry and investigation as to the health of the insured, and as to the statements made in the application and the policy, as an inducement to the contract. Within this time, if the defendant refused to perform its part of the contract and so notified the insured, three remedies are given to the plaintiff: '(1) He may elect to consider the policy at an end and recover its just value; (2) he may sue in equity to have the policy declared in force; (3) he may ten-

der the premiums and treat the policy as in force and recover the amount payable on it at maturity.' 14 R. C. L. 1004; *Day vs. Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 693; *Ins. Co. vs. McCormick*, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 393. The insurance company also has the right, if it concludes that the policy has been improperly procured, to institute *an action* for the cancellation of the policy within the year 'The insured may maintain a suit in equity in a proper case to rescind or cancel the contract for fraud on the part of the company or its agent or for breach of contract. In like manner [142] the company may maintain a suit in equity to cancel a policy because of fraud upon the part of the insured or the beneficiary, as the case may be, or because the policy is a wager policy by reason of want of insurable interest.' 25 Cyc. 788; *French vs. Connely*, 145 Eng. Report (Reprint), 933; *Whittingham vs. Thornbrough*, 23 Eng. Report (Reprint), 734, *Asso. vs. Palmer*, 53 Eng. Report (Reprint), 768; *Insurance Co. vs. Dick*, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566. The two cases relied on by the defendant (*Ins. Co. vs. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Cable vs. Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188), to sustain the position that the insurance company has no right to bring an action to have the policy cancelled or not in point, because, in both of these cases the right was denied upon the ground that an action at law was pending upon the policy, the insured having died, and it was held that the insurance company did not have the right to go into a

court of equity as it could set up the defense in a court of law. It follows, therefore, that the conduct of the defendant, in notifying the insured that it would cancel the policy and in tendering the first premium which had been paid, did not rescind or cancel the contract, as the plaintiff did not consent thereto, and amounted to no more than a breach, and that the *remedy of the defendant was to institute an action for cancellation* within the year, and as it did not do so, the policy was in force at the expiration of the year. This is also in accordance with the authorities holding that if the defendant wished to contest and to avoid the payment of the policy and the force of the incontestable clause, it must take *affirmative* action within the time limited by the policy. * * * The meaning of the terms, 'take affirmative action,' 'test the validity of the policy,' if in doubt, is made clear by the decision in *Wright vs. Benefit Ass'n*, [143] 43 Hun, 65, which was affirmed in 118 N. Y. 237, 23 N. E. 186. * * * We are therefore of opinion as the plaintiff had an insurable interest in the life of the insured when the policy was issued; and as no *action* was brought by the defendant within one year from the date of the policy to have the contract of insurance *canceled or rescinded*, that the incontestable clause was in force at the death of the insured, and that the defendant is precluded thereby from relying on the defenses set up." *American Trust Co. vs. Life Ins. Co.*, 92 S. E. (N. C.) 706, 711 (1917). "It does not follow, however, that we concur in appellant's views respecting the rights of

the parties under such a construction, but rather that if, as a result of such investigation or of knowledge otherwise obtained, the insurer desires to contest the policy, appropriate steps to that end, either by a defense to an action brought on the policy in case of the death of the insured, or *by proper affirmative action* must be taken within the year, otherwise that the policy becomes incontestable, save as to conditions excepted from the noncontestable clause. Such a construction is in harmony with the language of the stipulation, and does not necessitate the interpolation of words, phrases or clauses not found therein." *Ebner vs. Ohio State Life Ins. Co.*, 121 N. E. (Ind.) 315, 320 (1918). "If, therefore, there is nothing in the clause itself changing its terms or effect upon death of the insured within one year, if the clause was inserted for the benefit of the insurance company, to enable it to increase its business, if the period of one year after which the policy was to become incontestable, was to afford opportunity to the company to make its investigations and to *commence an action* for the cancellation of the policy, and if during the whole of the year someone has been in existence, the beneficiary, against whom [144] an action could be brought, we see no reason for refusing to give the plaintiff the full benefit of the clause as it is written. The death of the insured did not place the defendant at any disadvantage under the policy, nor stop its investigations, nor did it affect its right to commence an action, and in most cases death would inure to the benefit of the company, if it contemplated an

action to cancel the policy by removing a hostile witness.” *Hardy vs. Phoenix Mut. Life Ins. Co.*, 104 S. E. (N. C.) 166, 168 (1920). “It clearly appears, and in fact it is indisputable, that more than one year had elapsed since the issuance of the policy before *any act was done or action taken* by the defendant *to contest it*. Thus the defendant thereafter is, by the terms of its contract, precluded from voiding the policy for any cause whatever, except failure to pay the premium as provided in the policy. * * * In other words, after the expiration of a year, where there is no default in the payment of the premium, and thereafter the death of the insured should occur, the defendant has no defense against the collection or payment of the amount specified in the policy. It, in substance, has stipulated to that effect in its policy.” *Plotner vs. Northwestern Nat. Life Ins. Co.*, 183 N. W. (N. D.) 1000, 1003 (1921). “The insurance company agreed with the insured, if he would buy this policy for the benefit of his wife, it would not contest the payment of the insurance money after the expiration of one year from the date of the policy.”

“The defendant assumed this clause gave it the arbitrary right to cancel the policy at any time within the year, regardless of the rights of the insured. This clause does not mention cancellation; it provides the conditions under which the policy shall be incontestable. Webster’s International Dictionary defines these words as follows: ‘Contest: Earnest struggle for superiority, defense, [145] victory, etc.; competition; emula-

tion; strife or argument.' 'Cancel: To annul or recall; to mark out by a cross-line or lines; to strike out; to blot out or obliterate; specif., of legal documents, to annul, or make void or invalid, by such marking, or (by extension) in any way.' To cancel presupposes power or authority to do the act—cancel the contract. To perform the physical act of cancelling a contract by obliterating it, drawing lines through it to strike it out or by writing upon it 'canceled,' without the authority to cancel it, is a nullity, and the contract remains in full force and effect. This clause does not even purport to give the insurance company authority to cancel the contract. It may only contest it under certain conditions and upon certain grounds and within a specified time. A contest is an earnest struggle for superiority, or a defense. Reserving in a contract the right to contest any of its terms or provisions presupposes the right to resist such contest, and *that such contest shall take place before some person or tribunal with power and authority to decide the questions raised by such contest.*" Reliance L. Ins. Co. vs. Thayer, 203 Pac. (Okl.) 190, 192 (1921). "The language is not ambiguous. It admits of no reasonable construction, as the courts have said in the cases already cited, other than that the company may have one year, and no more, for investigation of the questions material to its risk, and if it does not within that time, either as plaintiff or defendant, contest the policy, it cannot do so afterward. Such contest can be made *only by proceedings in court* to

which the insurer and the insured, or his representatives or beneficiaries, are parties. American Trust Co. vs. Life Ins. Co. of Virginia, *supra*; Mutual Life Ins. Co. vs. Buford, *supra*.” Ramsay vs. Old Colony Life Ins. Co., *supra*. “The question seems to have been resolved against the defendant by the Illinois Supreme [146] Court and the construction of the incontestable clause contended for by plaintiff upheld, namely, that under the clause the defendant has two years from the date of the policy *in which to take affirmative action to cancel the same* or by a defense to a suit on the policy by the beneficiary within that period, and that *if no action is taken* within the two-year period the defendant is cut off from all defenses except nonpayment of premium, and the fact that the insured died within the period makes no difference.” Lavelle vs. Met. Life Ins. Co., 238 S. W. (Mo.) 504 (1922). “Stipulations to the effect that a policy or certificate shall become incontestable for fraud in procuring the same after the lapse of a specified period from the date of its issue have been held valid as creating a short statute of limitations in favor of the insured, and as giving the insurer a limited period for the purpose of *testing* the validity of the policy. In such cases the company or association cannot set up fraud as a defense if the period so fixed is sufficient to enable the company or association by the exercise of proper diligence, to ascertain whether fraud has been practiced or not.” Royal Circle vs. Achterath, 68 N. E. (Ill.) 492, 496 (1903). “An effect

of the provision in question was to fix a time limit for a contest of the policy by the insurer on a ground other than the nonpayment of premium. A contest so provided for *imports litigation, the invoking of judicial action* to cancel or prevent the enforcement of the policy, either by a suit to that end or by a defense to an action on the policy. *A mere denial or repudiation by the insurer of its liability under the policy, accompanied by a tender of the premium paid, is not a contest*, within the meaning of the provision. American Trust Co. vs. Life Insurance Co., 173 N. C. 558, 92 S. E. 706; Lavelle vs. Metropolitan Life Ins. Co., 209 Mo. App. 330, 238 S. W. 504; Pratt vs. Breckinridge, [147] 112 Ky. 1, 23, 65 S. W. 136, 66 S. W. 405" N. W. Mut. Life Ins. Co. vs. Pickering, *supra*. "Incontestable means not contestable. A contest in law implies an *adversary proceeding* in which matters in controversy may be settled by the courts upon issue joined. The great body of policy holders are persons who are not learned in the law and who have no knowledge of the judicial construction of pleadings. In the application of the rule just announced, we think the natural and most reasonable view is to hold that the insurer has not contested the policy until it has *acted* in the premises. The contract provides that the policy shall be incontestable after one year, and no action on the part of the insured or beneficiary can relieve the company of its duty to act. In order to contest the policy it was required to file an answer to the suit brought by the beneficiary within one year, *or to have insti-*

tuted an action of its own in equity to cancel the policy on the ground of fraud." Missouri State Life Ins. Co. vs. Cranford, *supra*. "The remedy of the defendant was to institute an action for cancellation within a year, and if it did not do so the policy was in force at the expiration of the year. In disposing of this question the learned chancellor, in his opinion, said: 'It takes two to make a contract and likewise it takes two to rescind one (Ault vs. Dustin, 100 Tenn. 666, 45 S. W. 981), or the judgment of a court of competent jurisdiction at the instance of the party having a good ground for rescission. It is true that the defendant undertook to rescind the contract in this case upon the ground of complainant's fraud in procuring it, on August 29, 1922, by delivering to complainant on that date a written notice to that effect and demanding the surrender of the policy. But complainant refused to agree to the rescission and refused to surrender the policy. The contract [148] was therefore not rescinded merely by the act of the defendant in giving said notice. It was open to the defendant thereafter to repent of its act and treat the policy as in full force and effect or it *might elect to have its right to rescind tested and enforced by a court, either by itself instituting a suit for that purpose or by interposing it as a defense if sued*. In my opinion it takes the one or the other of these steps to constitute a contest of the policy within the meaning of the statute and the contractual limitation found in the policy. In the instant case this was not done until the answer

and cross-bill was filed on October 16, 1922, which was after the one year had elapsed in any view of the date of issue of the policy.' ” *Thistle vs. Equitable Life Assur. Soc.*, 261 S. W. (Tenn.) 667, 668 (1924). See also *Jefferson Standard Life Ins. Co. vs. McIntyre*, *supra*; *Humpston vs. State Mutual Life Assur. Co.*, 256 S. W. (Tenn.) 438; *Great Western Life Ins. Co. vs. Snaveley*, 206 Fed. 20; *Dibble vs. Reliance Life Ins. Co.*, 170 Cal. 199, 149 Pac. 171; *Weil vs. Federal Life Ins. Co.*, 264 Ill. 425; *Reagan vs. Union M. L. Ins. Co.*, 189 Mass. 555, 76 N. E. 217; *Flanigan vs. Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178; *Mutual Life Ins. Co. vs. New*, 125 La. 41, 51 So. 61; *Central Law Journal*, Vol. 97, No. 3, p. 40.

It is true that the cases are not entirely uniform as to what affirmative action must be taken by the insurer in order to exempt it from the incontestability clause found in policies of life insurance. Some of the cases hold that this step must be by court action. Still other cases that it may be either by court action or other “affirmative” action. There is but the one exception, the *Rose* case, which holds that rescission may be had by act of the insurer (called by Bigelow “rescission *in pais*”), and when so taken by the insurer against the [149] assured on the ground of fraud prior to the elapsation of the first year of the policy it renders available to the insurer either a suit in equity for cancellation or the defense of fraud in an action at law by the beneficiary, even though said suit be filed or action brought after the elapsation of such

period. All the cases are unanimous, however, in holding that mere denial of liability is not sufficient. No difficulty is encountered in appreciating the reason underlying those decisions which hold that court action is necessary. If in an action brought by the beneficiary the insurer answers prior to the expiration of the first year of the policy, any defense of which the answer is capable is available to it irrespective of whether final judgment is entered during or after the expiration of the first year of the policy, the judgment operating as of the date of the filing of the answer, and, if fraud be found, determining the legal existence of the contract within the first year of the life of the policy. Similarly in the event of suit in equity brought by the insurer during the first year of the policy for rescission of the policy on the ground of fraud. A decree of cancellation operates as of the date that suit is filed and serves to cancel the policy *ab initio*. Hence, by the decree of cancellation in equity the contract of insurance will have been set aside within the first year of its life after which it would be of no further force or effect. In other words, in either event, that is, by a judgment at law against the beneficiary upon the defense of fraud or by a decree in equity of cancellation, the legal existence of the policy is judicially determined during and prior to the expiration of the first year of the policy. This is none the less true, even though the beneficiary delayed action at law until the expiration of the first year of the policy. If the insurer had previously and during the first year of

the policy [150] brought a suit for cancellation, a court of equity having acquired jurisdiction would retain it until decree and the action at law would necessarily abate and await the final determination of the suit in equity.

The same theory is involved in the event of rescission by act of the insurer (decided in the Rose case), that is, that rescission by act of the defrauded party operates to forthwith cancel the policy *ab initio*.

The majority rely for their conclusion upon the Rose case. But the Rose case does not decide that the mere denial of liability by the insurer is a "contest." On the contrary, it decides that rescission taken by the insurer against the insured (rescission *in pais*) cancels the policy as of the date of rescission and if accomplished within the first year of the policy exempts the insurer from the application of the one-year incontestability clause. The majority lack the support of any authority for their conclusion that a mere denial of liability by the insurer during the first year of the policy exempts it from the application of a one-year incontestability clause. And even assuming, but not deciding, that the legal effect of rescission *in pais* as decided by the Rose case is to cancel the policy forthwith, then the facts in the Rose case furnish an example of "affirmative" action which some of the authorities say the insurer in order to be exempt from the provisions of an incontestability clause must take prior to such clause coming into effect and may with "actions in court," be included in the steps, the imme-

diate or ultimate legal effect of which is to cancel the policy within the first year of its life or to render it within that time of no further effect. But whether rescission by action of the insurer prior to the [151] incontestability clause coming into effect exempts the insurer from its application is not involved in the instant case for the reason that the acts of the insurer of April 7, 1923, did not amount to a rescission of the policy, rendering the Rose case inapplicable.

It is fundamental that rescission may be had against the fraudulent party to the contract or his legal representatives. "Inasmuch as the right of rescinding a voidable contract is alternative and coextensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties." Wald's Pollock on Contracts, marg. p. 582, top p. 712. Whatever premiums were repayable to effect rescission were payable to the assured or his personal representatives. "The premium if returnable is due to the assured." 3 Joyce on Insurance, sec. 1428. " * * * She" (the beneficiary) "had * * * not the title to support an action of law upon it in her own name against the defendants or for the recovery of the premiums paid by her husband" (the assured). McDonald vs. Metropolitan Life Ins. Co., 38 Atl. (N. H.) 500, 501. There is no privity between the beneficiary and the assured. "Beneficiaries of a life insurance contract have, upon the repudiation of the policy by the company, no such interest in it

that enables them to recover the premiums paid, that right being invested in the insured.” 3 Joyce on Insurance, sec. 1428a. The beneficiary upon the death of the insured becomes vested with a legal demand against the insurer for the amount of the policy. “ * * * by the death of the *cestui que vie* the obligation to pay as expressed in the policies became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the [152] required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the sums insured became a purely legal demand * * * .” Insurance Co. vs. Bailey 13 Wall. (U. S.) 616, 622.

In the instant case the offer of the return of the premium was made to the beneficiary. It does not appear that she was in any way connected with the estate of the deceased assured. Nor does it appear that during the first year of the policy there was no legal representative of the estate of the assured upon whom tender of the premium might have been made. The offer to return the premium paid by the assured might as well have been made to a stranger. The burden of showing that there was no legal representative upon whom tender could be made devolved upon the insurer and not the beneficiary. It is upon the insurer and not the insured to show that it was wholly or partially exempted from the time limitation of the incontestability clause by reason of the absence of a legal representative of the assured. The majority say, “It is far from clear that a ten-

der of the premium was necessary in the case at bar to constitute a rescission *in pais*.” How can a rescission *in pais* be accomplished without an offer by the defrauded party to return to the fraudulent party the consideration received by the former under the alleged fraudulent contract? The defrauded party must rescind within a reasonable time after the discovery of the fraud or he will be taken as having affirmed the fraudulent contract. And how can rescission be had against a third party—a mere volunteer—for whose benefit the contract was made? Unquestionably the rights of the beneficiary depend upon the integrity of the insurance contract. But rescission must be taken against the fraudulent party (assured) or his legal representative. Nor [153] that the defrauded party was “anxious to return the premium to the person entitled to it” can it be said that rescission was thereby accomplished.

In the case of *Oplinger vs. N. Y. Life Ins. Co.*, 98 Atl. (Pa.) 568, a policy of insurance was issued by the insurer to Allen A. Oplinger on February 24, 1913, in which the assured’s wife was named as beneficiary. The assured died in January, 1914. On January 22, 1914, the defendant company notified the beneficiary that it rescinded the contract of insurance on the grounds of fraudulent representations and concealment of material facts by the assured. At the same time it tendered a return of the premiums, which tender was refused. Suit was then brought by the beneficiary. The defendant averred the rescission of the contract and paid

the amount of the tender into court. As to the effect of the alleged rescission of the contract the trial judge ruled: "If this rescission had been dated the 22d day of January, 1913, instead of 1914, and Allen Oplinger had still been living * * * a different question would be presented, and it would be my duty to charge you * * * as to the effect of a rescission; but * * * Mr. Oplinger being dead the case must be tried by us just as if there had not been this formal rescission and as if they (the insurance company) were defending * * * in the first instance on the ground of fraudulent representations and concealments." The appellate division affirmed the judgment of the trial court, and in commenting upon this instruction said: "We see no error in the legal attitude thus assumed by the court below. After the death of the insured the defendant company could not change the status of the beneficiary by an attempted rescission of the insurance contract." In the case of *Ramsay vs. Old Colony Life Ins. Co.*, *supra*, the Court said: "The appellant's right of action to contest [154] the validity of the policy was necessarily in abeyance after the death of the insured until the appointment of an administrator. There was no person in existence to be sued, the estate of the insured being the beneficiary in the policy, until such appointment. There was no person to whom the company could tender the premiums which it had received or against whom it could proceed for the cancellation of the policy."

The conclusion is inevitable that the insurer by its acts of April 7, 1923, did not effect a rescission of its policy. It is admitted that no other action was taken by it during the first year of the policy. Hence the interposition of fraud by the insurer during the incontestable period has for its sole justification the mere refusal by it to pay the beneficiary the amount of the policy upon the ground of fraud. This, in the opinion of the majority, was enough, and their opinion proceeds upon the theory that the insurer being by the terms of the policy prohibited from contesting it after the elapsation of the first year of the policy it may by implication "contest" the policy during the first year; that the denial of liability on the ground of fraud is a "contest"; that the insurance company inaugurated a "contest" within the first year of the policy and hence the incontestability clause does not apply. The word "contest," however, nowhere appears in the policy. The policy provides that it shall be "incontestable" after the elapsation of a certain period. It does not say that it shall be "incontestable" during one period and "contestable" during another. That is the inference of the majority. There is no necessity of interpretation. The incontestability clause is clear and unambiguous. We are only concerned with its meaning after it comes into operation and effect. It has no meaning [155] until the first year of the policy has elapsed and then only, for the purposes of the instant case, when an insurer defends or "contests" an action at law by the beneficiary

after the first year of the policy has elapsed, whereupon the sole question is of the jurisdiction of the contest in the face of the plain, clear, unequivocal and absolute inhibition of the incontestability clause.

But assuming that a denial of liability may be dignified by the term "contest," what is its effect? There is no question but that the insurer cannot contest after the elapsation of a year. What is there, then, in this mere denial of liability that renders inoperative the incontestability clause after the elapsation of the first year of the policy? To say that the denial of liability is a "contest" without showing wherein and how such contest exempts the insurance company from the application of the incontestability clause means absolutely nothing. The majority state that the rights of the insurer to contest during the first year of the policy "are as broad as they would have been if the clause of incontestability were not in the policy." Let us assume this to be true. Does this unlimited power of contestability during the first year of the policy, in the absence of an act of "contest," the immediate or ultimate legal effect of which is to neutralize the ensuing prohibition, detract one iota from the absolute prohibition against contest which becomes effective after this period of unlimited freedom has elapsed? To say that one may at one time perform an act prohibited at another time does not detract from the prohibition when effective. By mere denial of liability the policy is not canceled as by a decretal order of cancellation in equity.

By the mere denial of liability upon the ground of fraud the contract is not avoided and the defrauded party restored as upon rescission by the act of the defrauded [156] party, as held in the *Rose* case. Wherein does the mere denial of liability justify the interposition of the defense of fraud after the elapsation of a year in the face of the plain prohibition of the incontestability clause? For the insurer to say that it "contested" the policy within the first year of its life is not enough. It must show that it has done something prior to the expiration of the first year of the life of the policy, the immediate or ultimate legal effect of which is to exempt it from the prohibition of the incontestability clause, and failing this the incontestability clause operates to foreclose the defendant from the defense of fraud.

To hold that the mere denial of liability during the first year of the policy renders the incontestability clause of no application and permits the insurer to defend at any time against an action by the beneficiary seems to me to render the incontestability clause meaningless and of no effect and places the insured and beneficiary in the same position as though it were absent from the policy.

The judgment of the trial court should be affirmed.

E. C. PETERS. [157]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error to Circuit Court, First Circuit. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Petition for Rehearing. Rec'd and Filed in the Supreme Court Dec. 23, 1924, at 11:15 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff and Defendant in Error. [158]

[Title of Court and Cause.]

PETITION FOR REHEARING.

Now comes Chun Ngit Ngan, defendant in error in the above-entitled cause, and presents this petition for rehearing herein, and as grounds therefor sets forth as follows:

I.

That the keystone of the decision of the majority in the above-entitled matter is set forth in the following language in the decision:

“The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incon-

testability after the lapse of two years from their issuance.”

II.

That the foregoing statement of the rule is against the great weight of authority in this country.

III.

That the point was decided without argument by counsel and without the matter having been so much as raised by the plaintiff in error and without the defendant in error [159] having an opportunity to present the law thereon.

IV.

That the statute (S. L. 1917, Act 115, Sec. 50, Subd. 3) does not require the provisions inserted in the policy at issue in this cause, inasmuch as the requirement of the Statute is for any incontestability period not longer than two years and the selection by the company of a period of one year indicates its own choice and makes the policy subject to the usual rule that it shall be construed in favor of the insured or the insured's beneficiary regardless of what rule may be accepted by this Court as controlling when the clause is one artificially determined by statute law.

WHEREFORE, petitioner prays that she may have a rehearing in the above-entitled cause with an opportunity to present the law upon the foregoing rule adopted in the majority opinion without argument of counsel.

Dated Honolulu, T. H., this 23d day of December, A. D. 1924.

CHUN NGIT NGAN.
THOMPSON, CATHCART & BEEBE.

By F. E. THOMPSON,
Attorneys for Plaintiff and Defendant in Error.

Due service by copy of the within petition for rehearing is hereby admitted.

FREAR, PROSSER, ANDERSON &
MARX,

M. F. P.

Attorneys for Defendant and Plaintiff in Error,
Honolulu, Hawaii.

Dec. 23, 1924. [160]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error to Circuit Court, First Circuit. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Amended Petition for Rehearing. Rec'd and Filed in the Supreme Court Dec. 29, 1924, at 3:45 o'clock P. M. Robert Parker, Jr., Assistant Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff and Defendant in Error. [161]

[Title of Court and Cause.]

AMENDED PETITION FOR REHEARING.

Now comes Chun Ngit Ngan, defendant in error in the above-entitled cause, and presents this petition for rehearing herein, and as grounds therefor sets forth as follows:

I.

That the keystone of the decision of the majority in the above-entitled matter is set forth in the following language in the decision:

“The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance.”

II.

That the foregoing statement of the rule is against the great weight of authority in this country. [162]

III.

That the point was decided without argument by counsel and without the matter having been so much as raised by the plaintiff in error and without the defendant in error having an opportunity to present the law thereon.

IV.

That the Statute (S. L. 1917, Act 115, Sec. 50, Subd. 3) does not require the provision inserted in the policy at issue in this cause, inasmuch as the requirement of the Statute is for an incontestability period not longer than two years and the selection by the company of a period of one year indicates its own choice and makes the policy subject to the usual rule that it shall be construed in favor of the insured or the insured's beneficiary regardless of what rule may be accepted by this Court as controlling when the clause is one artificially determined by the statute law.

V.

That it appears by the majority opinion of the Court that the decision was based upon the proposition that the usual rule of construction that the language of a policy is to be taken more strongly against the insurer is not applicable because of a standard form policy statute of the Territory. Yet it further appears that the majority opinion of the Court recognized that this rule should be applied in the case at bar when the opinion, under point three uses the following language:

“The clause of incontestability was doubtless drawn by the ablest lawyers available to insurance companies—men who know the English language well and who were aware of the ordinary definitions given to the words ‘incontestable,’ ‘Contestable’ and ‘contest’ in the dictionaries. When under these circumstances they

saw fit to provide simply that after a stated period the policy should be 'incontestable' [163] without specifying that within that period the policy would be contestable by judicial proceedings only, *ghe* inference is certainly of the strongest that no such limitation was intended upon the methods open to the company within the period for contesting the policy."

VI.

That the decision herein is contradictory in that it rejects the rule that the policy shall be construed in favor of the insured or his beneficiary because of the insurance statute of the Territory and yet construes the policy under Section three of the majority opinion as having been drafted by the insurer and as containing the language which the insurer desired most to use.

WHEREFORE, petitioner prays that she may have a rehearing in the above-entitled cause with an opportunity to present the law upon the foregoing rule adopted in the majority opinion without argument of counsel.

Dated, Honolulu, T. H., this 29th day of December, A. D. 1924.

CHUN NGIT NGAN,
THOMPSON, CATHCART & BEEBE,
By MARGUERITE K. ASHFORD,
Attorneys for Plaintiff and Defendant in Error.

I, Marguerite K. Ashford, certify that I have given careful study to the decision of the Court in the above-entitled cause; that I prepared amended petition for rehearing herein and that I am convinced that the grounds thereof are well taken.

Dated, Honolulu, T. H., this 29th day of December, —.

MARGUERITE K. ASHFORD.

Due service, by copy of the within amended petition for rehearing, is hereby admitted.

FREAR, PROSSER, ANDERSON &
MARX,

M. F. P.,
Attorneys for Defendant,
Honolulu, Hawaii.

Dec. 29, 1924. [164]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1924. Petition for Rehearing. Chun Ngit Ngan vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed January 8, 1925, at 11:25 o'clock A. M. J. A. Thompson, Clerk. [165]

[Title of Court and Cause.]

OPINION OF SUPREME COURT ON PETITION FOR REHEARING.

Filed December 29, 1924.

Decided January 8, 1925.

PETERS, C. J., PERRY and LINDSAY, JJ.

Appeal and Error—Rehearing—Grounds—Opinion on immaterial point.

A rehearing will not be granted on the ground that the Court expressed an opinion upon a point not argued by counsel, when the point was not material to the decision of the case.

[166]

OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

The defendant in error moves for a rehearing on the ground that “the keystone of the decision” in this cause is contained in its statement that “the rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance”; that this “statement of the rule is against the great weight of authority in this country”; that “the point was decided without argument by coun-

sel'' and without its having been raised by the plaintiff in error; that the statute (L. 1917, Act 115, Sec. 50, Subd. 3) did not require the insertion in the policy under consideration of the particular clause relating to incontestability there appearing; and that the decision "is contradictory in that it rejects the rule that the policy shall be construed in favor of the insured or his beneficiary because of the insurance statute of the Territory and yet construes the policy under section three of the majority opinion as having been drafted by the insurer and as containing the language which the insurer desired most to use."

In the opinion filed the conclusion of the majority was not based upon any ambiguity of the language used in the contract. No ambiguity was found in the clause relating to incontestability but on the contrary comment was made upon the uniformity of definition in the dictionaries of the leading words involved. For this reason, therefore, if for no other, the rule of construction [167] referred to in the petition for rehearing is inapplicable in the case at bar.

The prohibition of Section 2259, R. L. 1915, against the decision of points not argued by counsel is directed merely to points which are "material to the decision of the case." The question of whether or not the statute rendered the rule of construction inapplicable in case of ambiguity was not material to the decision of this case. A rehearing or reconsideration of the point could not possibly affect the

conclusion of the Court that the judgment appealed from must be reversed.

The petition is denied without argument, under the rule.

THOMPSON, CATHCART & BEEBE, for the
Petition.

ANTONIO PERRY.

ALEXANDER LINDSAY, Jr.

[168]

DISSENTING OPINION OF PETERS, C. J.

Movant predicates her motion for a rehearing, not upon Rule 5 of this court but upon section 2259, R. L. 1915, which provides among other things that "after the argument of any cause, or when the same is submitted on briefs, if the Court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court." The movant in her brief contended that the language of the policy, being the language of the insurer, it should in case of ambiguity be taken most strongly against the insurer. The majority held that this rule was not applicable because of a territorial statute (L. 1917, c. 115, sec. 50, subd. 3) requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issu-

ance, citing the statute. Whether the language of the incontestability clause was ambiguous and what rules of construction should be applied thereto were material to the decision. That the majority held that the incontestability clause was not ambiguous is immaterial. It considered the point raised and rejoined thereto. The point being material its rejoinder was material. Moreover, its rejoinder was something entirely new. The statute requiring the inclusion in life insurance policies of an incontestability clause was not called to the attention of the Court by counsel either in their briefs or upon argument. It was a rejoinder resulting from the industry of the Court. Under the circumstances we have a clear case of a point involved which was material to the decision which had not been raised or argued by [169] counsel on either side. The statute is mandatory. The movant is entitled to a rehearing as a matter of right. The motion for a rehearing should be granted.

E. C. PETERS. [170]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Decision on Error. Filed January 12, 1925, at 3:35 P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald

Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [171]

[Title of Court and Cause.]

DECISION ON WRIT OF ERROR.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed on the 11th day of December, 1924, the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in favor of the plaintiff and against the defendant above named, is set aside and a new trial granted.

Dated at Honolulu, T. H., January 12, 1925.

By the Court.

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Approved.

A. PERRY,

Associate Justice. [172]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Notice of Decision on Error. Filed

January 12, 1925, at 3:35 P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [173]

[Title of Court and Cause.]

NOTICE OF DECISION ON WRIT OF ERROR.

To the Honorable Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

You will please take notice that in the above-entitled cause the Supreme Court has filed the following decision on error:

DECISION ON ERROR.

In the above-entitled cause, pursuant to an opinion of the above-entitled court filed on the 11th day of December, 1924, the Court ordered that the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of the plaintiff and against the defendant, be set aside and a new trial granted.

Dated at Honolulu, T. H., January 12, 1925.

By the Court:

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., January 12, 1925.

By the Court.

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii. [174]

The foregoing notice is hereby approved as to the form thereof, and it is ordered that the same issue forthwith.

Dated Honolulu, T. H., January 12, 1925.

[Seal]

A. PERRY,

Associate Justice of the Supreme Court of the Territory of Hawaii. [175]

[Title of Court and Cause.]

STIPULATION RE RETRIAL.

It is hereby stipulated by and between the parties plaintiff and defendant above named that the above-entitled cause be presented to the Court, jury waived, upon the evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant's behalf.

That Yuen Tai Kam, the insured named in the insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii.

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant's evidence relative to tender back of premiums paid [176] and demand for surrender of policy for cancellation; relative to fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial and plaintiff being allowed an exception.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the amount involved in the above-entitled action, exclusive of costs and attorneys' commissions, is in excess of \$5,000.00.

Dated, Honolulu, T. H., February 20th, 1925.

THOMPSON, CATHCART & BEEBE,

E. H. BEEBE,

Attorneys for Plaintiff.

FREAR, PROSSER, ANDERSON &

MARX,

M. F. P.,

Attorneys for Defendant.

[Endorsed]: Filed 2:05 P. M., Mar. 6, 1925.

[177]

[Title of Court and Cause.]

DECISION.

On a new trial of the above-entitled cause, ordered by the Supreme Court of the Territory of Hawaii (28 Haw. 99, Case No. 1556), the parties to said action by their respective counsel have by written stipulation on file herein agreed as follows:

“It is hereby stipulated by and between the parties plaintiff and defendant above named that the above-entitled cause be presented to the Court, jury waived, upon the evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant’s behalf.

That Yuen Tai Kam, the insured named in the insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii.

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant’s evi-

dence relative to tender back of premiums paid and demand for surrender of policy for cancellation; relative to [178] fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial and plaintiff being allowed an exception.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the amount involved in the above-entitled action, exclusive of costs and attorneys' commissions, is in excess of \$5,000.00.

The record herein shows that this is a suit on an insurance policy issued by the Prudential Insurance Company of America on the 1st day of May, 1922.

The name of the insured was Yuen Tai Kam and the beneficiary is Chun Ngit Ngan, designated in the policy as the wife of the insured.

The amount of the insurance is \$5,000.00. It was admitted at the trial that the insured died on February 5th, 1923; that at the time of his death all premiums due under the policy of insurance had been paid; that the plaintiff is the beneficiary named in the policy, and that she was the wife of the insured; that due notice of the death of the insured was furnished the defendant under the provisions of the policy; that no court proceedings

were taken by the defendant to contest its liability under the policy within one year subsequent to its issuance.

Evidence was introduced by the defendant tending to show that at the time the insured made application for insurance, he made to the examining physician certain false and fraudulent statements concerning his physical condition and the state of his health, and I am of the opinion from this evidence that the insured thus practiced a fraud on the defendant and that if the insured had truthfully stated [179] to the examining physician his physical condition, the defendant would not have issued the policy. The policy of insurance contains the following provision: "This policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the insured be misstated the amount or amounts payable under this policy shall be such as the premium would have purchased at the correct age."

Before the expiration of one year from the date of the policy, and subsequent to the death of the insured, the defendant, thru its agents, called on the beneficiary at her home in Honolulu and tendered to her the full amount of the premiums that had been paid on the policy and demanded its return. The beneficiary declined to accept the premiums tendered to her and declined to surrender the policy.

It is the contention of the defendant that because of the fraud practiced on it by the insured, the

policy of insurance was void and that in thus tendering to the beneficiary the premiums that had been paid and demanding a return of the policy, the defendant contested the policy as it had a right to do.

The plaintiff, on the other hand, contends that the defendant could only have contested the policy on the ground of fraud by instituting, within one year from its date, some appropriate legal proceeding challenging its validity and that merely tendering to the beneficiary the premiums that had been paid and demanding a return of the policy were not a contest within the meaning of the law.

The Supreme Court having settled the law of this case, [180] 28 Haw. 99, says:

“When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud, even though the policy contains a clause that it shall be incontestable after one year from its date of issue and even though the company did not within the period of one year institute

judicial proceedings to cancel the policy on the ground of fraud.”

Judgment will therefore be entered for the defendant, with costs to be taxed against plaintiff herein.

Dated at Honolulu, T. H., this 21st day of March, 1925.

[Seal] FRANK ANDRADE,
First Judge, Circuit Court, First Judicial Circuit,
Territory of Hawaii.

[Endorsed]: Filed 11:25 o'clock A. M., March 21st, 1925. [181]

[Title of Court and Cause.]

EXCEPTION TO DECISION.

Now comes Chun Ngit Ngan, plaintiff herein, and notes its exception to the decision of the Court entered herein upon the ground that it is contrary to the law and evidence and the weight of the evidence.

Dated Honolulu, T. H., this 28 day of March, 1925.

CHUN NGIT NGAN,
Plaintiff Herein.
THOMPSON, CATHCART & BEEBE,
By MARGUERITE K. ASHFORD,
Her Attorneys.

Approved.

FRANK ANDRADE, (Seal)
Judge of the Above-entitled Court.

[Endorsed]: Filed at 9:10 o'clock, A. M., Mar. 30, 1925. [182]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

LAW—No. 10,307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant.

JUDGMENT.

This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys' commissions, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs at \$213.78 and that defendant have execution therefor.

By the Court.

[Seal]

H. A. WILDER,

Clerk of the First Judicial Circuit, Territory of
Hawaii.

Entered this 31st day of March, 1925.

O. K. as to form.

THOMPSON, CATHCART & BEEBE,
Per E. H. B.,
Attys. for Pltff.

[Endorsed]: Filed Mar. 31, 1925, at 11:50 A. M.
[183]

[Title of Court and Cause.]

EXCEPTION TO JUDGMENT.

Now comes Chun Ngit Ngan, plaintiff in the above-entitled cause, by Thompson, Cathcart & Beebe, her attorneys, and hereby excepts to the judgment heretofore entered herein on th 31st day of March, A. D. 1925, in favor of the Prudential Insurance Company of America, a New Jersey corporation, defendant and against the plaintiff herein.

Dated, Honolulu, T. H., this 1st day of April, A. D. 1925.

CHUN NGIT NGAN,
Plaintiff Above Named.
THOMPSON, CATHCART & BEEBE,
By E. H. BEEBE,
Her Attorneys.

Allowed.

FRANK ANDRADE, (Seal)
Judge of the Above-entitled Court.

[Endorsed]: Filed at 3:10 o'clock P. M., April 1, 1925. [184]

[Title of Court and Cause.]

APPLICATION FOR WRIT OF ERROR.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled case to the Clerk of the Circuit Court of the First Judicial Circuit on behalf of said Chun Ngit Ngan, plaintiff in error, returnable to the Supreme Court of the Territory of Hawaii.

CHUN NGIT NGAN,
Plaintiff in Error Above Named.
By E. H. BEEBE,
Her Attorneys. [185]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Chun Ngit Ngan, plaintiff in error above named and petitioner for a writ of error in the above-entitled cause, and says that in the records, proceedings, judgments, decisions, ruling, orders and final judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in an action lately pending in said Circuit Court, wherein your petitioner was and is plaintiff and said The Prudential Insurance Company of America, a New Jersey corporation, was and is defendant, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of errors upon which she relies, as follows, to wit:

ASSIGNMENT OF ERROR No. 1.

Error in the admission of the following evidence over the objections and exception of plaintiff (Stipulation of date, February 20th, 1925):

“The evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant’s behalf;

That Yuen Tai Kam, the insured named in insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii. [186]

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant’s evidence relative to tender back of premiums paid and demand for surrender of policy for cancellation; relative to fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam,”

ASSIGNMENT OF ERROR No. 2.

The Court erred in finding that the insured practised a fraud upon the defendant and defendant in error.

ASSIGNMENT OF ERROR No. 3.

The Court erred in finding that the insured did not truthfully state to the examining physician his physical condition.

ASSIGNMENT OF ERROR No. 4.

The Court erred in finding that the defendant and defendant in error would not have issued the policy if the insured had truthfully stated to the examining physician his physical condition.

ASSIGNMENT OF ERROR No. 5.

The Court erred in holding that the Supreme Court had settled the law of this case; 28 Haw. 99, saying:

“When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud,

even though the policy contains a clause that it shall be incontestable after one year from its date of issue and even though the company did not within the period of one year institute judicial proceedings to cancel the policy on the ground of fraud.” [187]

ASSIGNMENT OF ERROR No. 6.

The Court erred in rendering and entering its decision herein.

ASSIGNMENT OF ERROR No. 7.

The Court erred in directing judgment herein to be entered for the defendant and defendant in error.

ASSIGNMENT OF ERROR No. 8.

Error in the entry of judgment as follows:

“This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys’ commission, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs taxed at \$213.78 and that defendant have execution therefor.

By the Court:

(S.) H. A. WILDER,
Clerk of the First Judicial Circuit, Territory
of Hawaii.

Entered this 31 day of Mar., 1925.”

ASSIGNMENT OF ERROR No. 9.

Error in the taxation of costs in favor of defendant and defendant in error and against plaintiff and plaintiff in error.

Dated, Honolulu, T. H., this 1st day of April A. D. 1925.

CHUN NGIT NGAN,
Plaintiff and Plaintiff in Error.

THOMPSON, CATHCART & BEEBE,
By E. H. BEEBE,
Her Attorneys. [188]

No. 1612. In the Supreme Court of the Territory of Hawaii. Error No. 1612. From Circuit Court First Circuit. Judge Frank Andrade. Chun Ngit Ngan, Plaintiff in Error vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Writ of Error and Return. Filed April 2, 1925, at 2:33 P. M. and issued same. J. A. Thompson, Clerk. Received April 2, 1925, 3 P. M. Henry Smith, Chief Clerk, Circuit Court First Jud. Circuit, Ter. Haw. Returned April 14, 1925, at 3:25 P. M. Robert Parker, Jr., Assistant Clerk. [189]

[Title of Court and Cause.]

WRIT OF ERROR.

The Territory of Hawaii:

To the Clerk of the Circuit Court of the First
Judicial Circuit, Territory of Hawaii.

Application having been made on behalf of said
Chun Ngit Ngan, plaintiff in error above named,
for writ of error in the above-entitled case, you are
commanded forthwith to send to the Supreme Court
the record in the above case.

WITNESS the Honorable EMIL C. PETERS,
Chief Justice of the Supreme Court of the Terri-
tory of Hawaii, this 2d day of April, A. D. 1925.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court. [190]

[Title of Court and Cause.]

RETURN OF CLERK TO WRIT OF ERROR.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears
by the record hereto attached.

Dated, Honolulu, T. H., this 14 day of April,
A. D. 1925.

HENRY SMITH,

Clerk of the Circuit Court of the First Judicial
Circuit, Territory of Hawaii. [191]

In the Supreme Court of the Territory of Hawaii.
Error No. 1612. From Circuit Court, First Circuit.
Judge Andrade. Chun Ngit Ngan, Plaintiff in

Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Bond on Writ of Error. Filed April 2, 1925, at 2:30 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, Honolulu, T. H., Attorneys for Defendant in Error. [192]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That Chun Ngit Ngan, as principal, and the United States Fidelity and Guaranty Company, are held and firmly bound unto the Prudential Insurance Company of America, a New Jersey corporation, defendant in error above named, and its successors and assigns, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States, for the payment of which well and truly to be made, we bind our heirs, executors, administrators, successors and assigns, jointly, severally and firmly, by these presents.

Sealed with our seals, and dated this 2d day of April, 1925.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT:

WHEREAS, the said The Prudential Insurance Company of America, a New Jersey corporation, defendant in error, above named, did recover a

judgment against the above bonded, Chun Ngit Ngan, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on the 31st day of March, A. D. 1925, in words and figures as follows:

“JUDGMENT.

This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys' [193] commissions, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs taxed at \$213.78 and that defendant have execution therefor.

By the Court.

(S.) H. A. WILDER,
Clerk of the First Judicial Circuit, Territory of
Hawaii.

Entered this 31st day of Mar., 1925.”

From which said judgment the said named principal obligor has prosecuted a writ of error from the Supreme Court of the Territory of Hawaii to said Circuit Court.

NOW, THEREFORE, if the said Chun Ngit Ngan, principal obligor above-named, shall pay the judgment in said original cause in case of failure to sustain the writ of error, then the above obliga-

tion to be void; otherwise to remain in full force and virtue.

CHUN NGIT NGAN,
Principal.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, (Seal)

By EDWIN BENNER,
Its Attorney-in-Fact.
Surety.

O. K.—FREAR, PROSSER, ANDERSON &
MARX.

P.

[Endorsed]: Filed at 3:05 o'clock P. M., April 2,
1925. [194]

[Title of Court and Cause.]

NOTICE OF ISSUANCE OF WRIT OF ERROR.

To the Above-named, the Defendant in Error, and to
Messrs. Frear, Prosser, Anderson & Marx, Its
Attorneys.

You and each of you will please take notice that a writ of error has issued from the Supreme Court of the Territory of Hawaii to the Circuit Court of the First Judicial Circuit, said Territory, in the action lately pending, in which the Prudential Insurance Company of America, a New Jersey corporation, was defendant and Chun Ngit Ngan was

plaintiff, numbered and docketed in said court as Law Number 10307.

Dated, this 1st day of April A. D. 1925.

CHUN NGIT NGAN,
Plaintiff and Plaintiff in Error,
THOMPSON, CATHCART & BEEBE,
By E. H. BEEBE,
Her Attorneys. [195]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Circuit Court of the First
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause, you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii, the record in the above-entitled cause including the documents hereinafter referred to:

1. Stipulation of February 20th, 1925, re evidence.
2. Decision.
3. Exception to decision.
4. Bill of costs.
5. Exception to bill of costs.
6. Judgment.
7. Exception to judgment.
8. The record upon former writ of error in this cause.

Dated, Honolulu, T. H., this 1st day of April, 1925.

CHUN NGIT NGAN,
Plaintiff in Error Above Named.
THOMPSON, CATHCART & BEEBE,
By E. H. BEEBE,
Her Attorneys. [196]

No. 1612. In the Supreme Court of the Territory of Hawaii. October Term, 1924. Error to Circuit Court, First Circuit, Hon. F. Andrade, Presiding. Chun Ngit Ngan, vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed May 11, 1925 at 3:10 o'clock P. M. J. A. Thompson, Clerk. [197]

[Title of Court and Cause.]

Error to Circuit Court, First Circuit.

Hon. F. ANDRADE, Judge.

Submitted May 9, 1925.

Decided May 11, 1925.

PETERS, C. J., PERRY and LINDSAY, JJ.

Decided upon the authority of Chun Ngit Ngan vs. Prudential Insurance Co., *ante*, 99.

Affirmed. [198]

OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

The prior history of this case is recited in our opinion reported *ante*, 99. The first judgment was

set aside and a new trial granted. At the second trial, by stipulation of the parties, the cause was presented to the Court, jury waived, upon the evidence adduced at the first trial together with the following additional evidence on defendant's behalf:

"That Yuen Tai Kam, the insured named in the insurance policy, the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan surviving him, said father and widow being residents of the Territory of Hawaii;

"That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to;

"That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and that thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant's evidence relative to tender back of premiums paid and demand for surrender of policy for cancellation, relative to fraud of insured in making application for the policy which is the subject matter of this action and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial."

Following our prior opinion the trial court thereupon entered judgment for the defendant. From

that second judgment the case comes to this court on a writ of error. [199]

In addition to relying upon its former briefs and the former opinion of this Court, the insurance company now presents the following contentions: (1) that "the notice by the insurer to Chun Ngit Ngan of the repudiation of the policy, tender to her of the premium paid and demand for return of the policy was a rescission of such policy and therefore a contest thereof" and (2) that "the insurer herein contested the policy sued upon by judicial action within the period of contestability allowed by the policy," due to the fact, as it is further contended, that the time elapsing from the date of the death of insured to the date of the appointment of the administrators should not be considered as a part of the period of one year referred to in the clause of incontestability.

We deem it to be unnecessary to consider either of these contentions. Upon the reasoning contained in our former opinion, the judgment for the defendant is affirmed.

THOMPSON, CATHCART & BEEBE, for Plaintiff in Error.

FREAR, PROSSER, ANDERSON & MARX and
A. E. STEADMAN, for Defendant in Error.

ANTONIO PERRY,
ALEXANDER LINDSAY, JR. [200]

DISSENTING OPINION OF PETERS, C. J.

Nothing has been called to my attention to cause me to doubt the conclusions that I heretofore

reached upon the former hearing. Under the circumstances I respectfully dissent from the majority.

E. C. PETERS. [201]

No. 1612. In the Supreme Court of the Territory of Hawaii. Error to Circuit Court, First Circuit. Judge Frank Andrade, Presiding. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Filed May 12, 1925, at 10:55 o'clock A. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [202]

No. 1612.

In the Supreme Court of the Territory of Hawaii.
Error to Circuit Court, First Circuit.

Judge FRANK ANDRADE, Presiding.

CHUN NGIT NGAN,

Plaintiff in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey Corporation,
Defendant in Error.

JUDGMENT ON WRIT OF ERROR.

In the above-entitled cause, pursuant to the opinion of the above Court rendered and filed on the

11th day of May, A. D. 1925, the judgment for defendant is affirmed.

Dated, Honolulu, T. H., May 12, 1925.

By the Court:

[Seal]

J. A. THOMPSON,
Clerk of the Supreme Court.

Approved.

E. C. PETERS,
Chief Justice, Supreme Court, Territory of Hawaii.
[203]

In the Supreme Court of the Territory of Hawaii.
Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Bond on Writ of Error. Filed June 30, 1925, at 2:50 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error.
[204]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:
That Chun Ngit Ngan, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Prudential Insurance Company of America, a New Jersey corporation, in the penal

sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made to said The Prudential Insurance Company of America, a New Jersey corporation, we bind ourselves and our respective heirs, executors, administrators, successors and assigns firmly by these presents.

THE CONDITION of the above obligation is such that,—

WHEREAS, on the 30th day of June, 1925, the above bounden principal sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 12th day of May, 1925, by the Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said principal shall prosecute her said writ of error to effect and answer all damages and costs if she fails to sustain her writ of error, then this [205] obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said Chun Ngit Ngan, principal, has hereunto set her hand and United States Fidelity and Guaranty Company of Baltimore, Maryland, has caused this instrument

to be executed and its seal hereon impressed this 30th day of June, 1925.

CHUN NGIT NGAN,

Principal.

UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BALTI-
MORE, MARYLAND,

Surety.

[Seal]

By HERMAN LUIS,

Its Attorney-in-fact.

The foregoing bond is approved.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Terri-
tory of Hawaii. [206]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Petition for Writ of Error. Filed June 30, 1925, at 2:50 P. M. and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [207]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Chun Ngit Ngan, plaintiff and petitioner in the above-entitled cause, deeming herself aggrieved by the decision and judgment in said cause, affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was made and entered upon the 12th day of May, 1925, and claiming that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in assignment of errors filed herewith, to which reference is hereby made, now comes by Thompson, Cathcart & Beebe, her attorneys, and respectfully prays that a writ of error be allowed her in the above-entitled cause and that she be allowed to prosecute the same to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of [208] security the petitioner shall give, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers in this cause, duly

authenticated, for the correction of the errors so complained of, and that a citation may issue.

And in this behalf the petitioner shows that the said judgment was rendered in an action at law, and that the amount involved in said action, exclusive of costs, exceeds the sum or value of Five Thousand Dollars.

Dated at Honolulu, T. H., this 23d day of June, 1925.

CHUN NGIT NGAN,
Petitioner.

By THOMPSON, CATHCART & BEEBE,
Her Attorneys.

City and County of Honolulu,
Territory of Hawaii,
United States of America,—ss.

Frank E. Thompson, being first duly sworn, on oath deposes and says: That he is a member of the firm of Thompson, Cathcart & Beebe, the attorneys for the above-named petitioner, Chun Ngit Ngan; that he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge, and further that the amount [209] involved in the cause aforesaid, exclusive of costs, exceeds the sum of Five Thousand Dollars.

FRANK E. THOMPSON.

Subscribed and sworn to before me this 23d day of June, A. D. 1925.

[Seal] ALMA S. HERMANSON,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

The foregoing petition is granted, a writ of error allowed, and bond on said writ of error is fixed at \$500.

Dated June 30, 1925.

[Seal]

E. C. PETERS,
Chief Justice. [210]

In the Supreme Court of the Territory of Hawaii.
Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Acknowledgment of Service. Filed June 30, 1925, at 3:40 P. M. J. A. Thompson, Clerk. [211]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE.

Service and receipt of a copy of the petition for writ of error, the assignment of errors, the writ of error, and the citation on writ of error in the proceeding upon writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii, in the above-entitled cause, is hereby acknowledged this 30th day of June, 1925.

FREAR, PROSSER, ANDERSON & MARX,
Attorneys for The Prudential Insurance Company
of America, a New Jersey Corporation.

By M. F. PROSSER. [212]

In the Supreme Court of the Territory of Hawaii.
Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jer-

sey Corporation, Defendant in Error. Amended Praecipe. Filed July 10, 1925, at 11:15 A. M. J. A. Thompson, Clerk. Thompson, Carthcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [213]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT
OF RECORD.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

A. In record No. 1556:

1. Copy of amended complaint dated November 8, 1923.
2. Copy of amended answer to said amended complaint, dated and filed January 5, 1924.
3. Copy of decision of Circuit Judge Banks filed May 10, 1924.
4. Copy of judgment of the Circuit Court, First Circuit, entered May 12, 1924.
5. Copy of exception by defendant to decision and judgment filed May 13, 1924.
6. Copy of Reporter's transcript of the evidence. [214]

7. Copy of Plaintiff's Exhibit "A."
8. Copy of Defendant's Exhibit 1.
9. Copy of Defendant's Exhibit 2.
10. Copy of Defendant's Exhibit 3.
11. Copy of Defendant's Exhibit 4.
12. Copy of Defendant's Exhibit 5.
13. Copy of Defendant's Exhibit 6.
14. Copy of Defendant's Exhibit 7.
15. Copy of minutes of the Clerk, Circuit Court, First Circuit.
16. Copy of application for writ of error of the plaintiff, dated May 19, 1924.
17. Copy of assignment of errors, dated May 19, 1924.
18. Copy of bond on writ of error dated May 19, 1924, for the sum of \$6,000.00. The Prudential Insurance Company of America, principal; National Security Company, surety, and Chun Ngit Ngan, obligee.
19. Copy of writ of error, dated May 19, 1924.
20. Copy of return to writ of error dated June 23, 1924.
21. Copy of notice of issuance of writ of error, dated May 19, 1924.
22. Copy of praecipe, dated May 19, 1924.
23. Copy of opinion of the Supreme Court of the Territory of Hawaii of December 11, 1924, reported in Volume 28 Hawaii Reports, pages 99-144.
24. Copy of petition for a rehearing dated December 23, 1924.

25. Copy of amended petition for a rehearing dated December 29, 1924.
26. Copy of opinion of the Supreme Court of the Territory of Hawaii on petition for rehearing dated [215] January 8, 1925, reported in Volume 28, Hawaii Reports, pages 157-159.
27. Copy of decision on writ of error, dated January 12, 1925.
28. Copy of notice of decision on writ of error, dated January 12, 1925.
- B. In record No. 1612:
 29. Copy of stipulation of February 20, 1925, *re* evidence.
 30. Copy of decision of Circuit Judge Andrade of March 21, 1925.
 31. Copy of exception by plaintiff to decision filed March 30, 1925.
 32. Copy of judgment of the Circuit Court, First Circuit, filed March 31, 1925.
 33. Copy of exception by plaintiff to judgment of March 31, 1925, filed April 1, 1925.
 34. Copy of application for writ of error of the plaintiff, dated April 1, 1925.
 35. Copy of assignment of errors, dated April 1, 1925.
 36. Copy of writ of error, dated April 2, 1925.
 37. Copy of return of clerk to writ of error, dated April 14, 1925.
 38. Copy of bond on writ of error dated April 2, 1925, for the sum of \$500.00 Chun Ngit

Ngan, principal; United States Fidelity and Guaranty Company, surety, and The Prudential Insurance Company of America, a New Jersey corporation, obligee. [216]

39. Copy of notice of issuance of writ of error, dated April 1, 1925.
40. Copy of praecipe, dated April 1, 1925.
41. Copy of opinion of the Supreme Court of the Territory of Hawaii, dated May 11, 1925, reported in Volume 28, Hawaii Reports, pages 392-394.
42. Copy of judgment of the Supreme Court of the Territory of Hawaii entered and filed May 12, 1925.
43. Copy of the bond on writ of error, dated June 30, 1925, for the sum of \$500.00, Chun Ngit Ngan, principal, United States Fidelity and Guaranty Company of Baltimore, Maryland, surety, and The Prudential Insurance Company of America, a New Jersey corporation, obligee.
44. Copy of petition for writ of error to the Supreme Court of the Territory of Hawaii, dated June 30, 1925, and noted at the end thereof is the order granting the petition and allowing writ and fixing bond in the sum of \$500.00.
45. Acknowledgment of service, dated June 30, 1925.

46. Copy of amended praecipe for transcript of record, dated July 10, 1925.

You will also annex to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, the original assignment of errors, and original citation with return of service, your return to the writ of error under the seal of the Supreme [217] Court of the Territory of Hawaii, and also your certificate stating in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., July 10, 1925.

THOMPSON, CATHCART & BEEBE,

Attorneys for Plaintiff in Error.

By F. E. THOMPSON.

By M. K. A. [218]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Writ of Error. Filed June 30, 1925, at 2:50 P. M., and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [219]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to
the Honorable Justice of the Supreme Court
of the Territory of Hawaii, GREETING:

Because in the record and in the proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant, manifest errors have happened to the great prejudice and damage of said Chun Ngit Ngan, petitioner and plaintiff, as is said and appears by the petition herein,

We, being willing that errors, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command [220] you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, and filed in the Circuit Court of Appeals for the Ninth Circuit, thirty days after the date hereof to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to

correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 30 day of June, 1925.

Attest my hand and the seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed this 30th day of June, 1925.

E. C. PETERS,
Chief Justice of the Supreme Court of the Territory of Hawaii. [221]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Assignment of Errors. Filed June 30, 1925, at 2:50 P. M. and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [222]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Chun Ngit Ngan, herein named as plaintiff in error, and respectfully represents that there are manifest errors in the record in the above-entitled cause, in the Supreme Court of the Territory of Hawaii, in this, to wit:

1. That the Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated March 31, 1925;

2. That the Court erred in making and entering its judgment of the 12th day of May, 1925, affirming the judgment of the Circuit Court of date March 31, 1925;

3. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the insurance company had instituted a contest of policy within one year from the date of the policy;

4. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the defense of fraud was available in the above-entitled cause;

5. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the ordinary, every day meaning of the word incontestable leads to the conclusion that [223] the insurance company had contested the policy within a year after the date of the policy;

6. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there

was not any difficulty in ascertaining what the ordinary meaning of "incontestable" is;

7. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there was absolutely nothing in the policy to show that the word "incontestable" or its inferential antonym "contestable" was not used in its ordinary acceptation or was used only in its narrower meaning as an attack in court;

8. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there is no provision in the policy to the effect that the "contest" which is permitted within the first year shall be by judicial proceedings only;

9. That the Court erred, in its opinion and decision of December 11, 1924, in construing the words "incontestable" and "contestable" according to the meaning which it held was intended by the lawyers for the insurance company instead of construing such words most strongly against the party providing the policy;

10. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the origin and purpose of the clause of incontestability in policies are not open to doubt;

11. That the Court erred, in its opinion and decision of December 11, 1924, in holding that as the word "incontestable" is undoubtedly used in the policy as meaning indisputable in any way whatsoever, i. e., in court or out of court, so also the inferential antonym "contestable" means disputable

by any or every method which constitutes a dispute or attack, i. e., in court or out of court; [224]

12. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period, and that, therefore, as to the latter, the rights of the insurer are as broad as they would have been if a clause of incontestability were not in the policy, and that therefore, without that clause those rights for the first year would have included the right to dispute or attack out of court as well as in court;

13. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates how it may be contested within the year;

14. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the policy is contestable other than judicially during the first year;

15. That the Court erred, in its opinion and decision of December 11, 1924, in repudiating what it recognized as an overwhelming weight of authority;

16. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the policy does not specify a contest in law and does not specify any particular mode of contest whatever;

17. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the rule that the language of a policy, because it was chosen by the insurer is in case of ambiguity to be taken most strongly against the insurer was not applicable in this case, because there is a statute of this Territory requiring the inclusion in all policies of life [225] insurance of a clause providing for incontestability after the lapse of two years from the insurance; and in holding that the language of the policy under these circumstances is deemed not to be that of the insurance company;

18. That the Court erred, in its opinion and decision of December 11, 1924, in setting aside the judgment of the Circuit Court of the First Judicial Circuit of date May 12, 1924;

19. That the Court erred, in its decision of December 11, 1924, in granting a new trial;

20. That the Court erred, in its opinion and decision of January 8, 1925, in refusing a rehearing of the cause;

21. That the Court erred, in its opinion and decision of January 8, 1925, in holding that the decision of the Court of December 11, 1924, that any ambiguity in the policy was not to be construed against the insurance company was not material to the decision;

22. That the Court erred, in its decision of January 8, 1925, in holding that a rehearing or reconsideration of the point whether any ambiguity should be construed against the insurer could not possibly affect the conclusion of the Court that the

judgment of the Circuit Court of May 12, 1924, must be reversed;

23. That the Court erred, in its decision of May 12, 1925, in affirming the judgment of the Circuit Court of March 31, 1925, upon the reasoning contained in the opinion of the Supreme Court of December 11, 1924;

24. That the Supreme Court erred in failing to reverse the judgment of the Circuit Court of the First Judicial Circuit of March 31, 1925;

25. That the Supreme Court erred in reversing the judgment of the Circuit Court of the First Judicial Circuit of May 12, 1924. [226]

WHEREFORE said Chun Ngit Ngan, plaintiff in error herein, prays that the judgment of the Supreme Court of the Territory of Hawaii be reversed and that said Court be ordered to enter a judgment vacating and setting aside the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii of date March 31, 1925, and affirming the judgment of the said Circuit Court of date May 12, 1924.

Dated at Honolulu, T. H., this 30 day of June, 1925.

CHUN NGIT NGAN,
Plaintiff in Error.

By THOMPSON, CATHCART & BEEBE,
Her Attorneys.

By F. E. THOMPSON. [227]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Company of America, a New Jersey Corporation, Defendant in Error. Citation on Writ of Error. Filed June 30, 1925, at 2:50 P. M. and Issued for Service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [228]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to
The Prudential Insurance Company of America,
a New Jersey Corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Chun Ngit Ngan is plaintiff in error, and you are defendant in error, to show cause, if any there may be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 30th day of June, 1925.

Honolulu, T. H. June 30, 1925.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [229]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Order Extending Time to and Including September 30, 1925, to File Record and Docket Cause. Filed July 13, 1925, 10:25 o'clock A. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu T. H., Attorneys for Defendant in Error. [230]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 30, 1925, TO FILE RECORD AND DOCKET CAUSE.

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Chun Ngit Ngan, and the Clerk of this court, be and they are hereby allowed until and including the 30th day of September, 1925, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as part of said record.

Dated at Honolulu, T. H., July 13, 1925.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory
of Hawaii. [231]

[Title of Court and Cause.]

CERTIFICATE OF THE CLERK OF THE SUPREME COURT OF THE TERRITORY OF HAWAII TO THE TRANSCRIPT OF RECORD UPON WRIT OF ERROR AND RETURN TO WRIT OF ERROR.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 219 to 221, both inclusive, of the foregoing transcript of record, and in pursuance to the amended praecipe to me directed, a copy whereof is hereto attached, being pages 213 to 218, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 175, both inclusive. AND I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries, exhibits and opinions which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled “Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant,” and Numbered 1556.

I FURTHER CERTIFY that pages 176 to 212, both inclusive, of the foregoing transcript of record, are full, true and [232] correct copies of the

pleadings, record, entries, opinions and final judgment, which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled "Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error," Numbered 1612.

I DO FURTHER CERTIFY that the original assignment of errors, dated and filed June 30, 1925, being pages 222 to 227, both inclusive, the original citation on writ of error, dated and filed June 30, 1925, being pages 228 to 229, both inclusive, and the original order granting Chun Ngit Ngan, plaintiff in error and the Clerk of the Supreme Court of the Territory of Hawaii an extension of time until and including September 30, 1925, within which time to prepare and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the record on writ of error, dated and filed July 13, 1925, being pages 230 to 231, both inclusive, of the foregoing transcript of record are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$155.90, and the said amount has been paid by Messrs. Thompson, Cathcart & Beebe, the attorneys for Chun Ngit Ngan, plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and

County of Honolulu, this 3d day of August, A. D. 1925.

[Seal]

JAMES A. THOMPSON,

Clerk of the Supreme Court of the Territory of
Hawaii. [233]

[Endorsed]: No. 4660. United States Circuit Court of Appeals for the Ninth Circuit. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Supreme Court of the Territory of Hawaii.

Filed August 12, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



No. 4660

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

2

NINTH CIRCUIT

CHUN NGIT NGAN,

Plaintiff-in-Error,

VS.

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, A NEW JERSEY CORPORATION,

Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII

THOMPSON, CATHCART & BEEBE,
FRANK E. THOMPSON,
EUGENE H. BEEBE,
MARGUERITE K. ASHFORD,

Attorneys for Plaintiff-in-Error.

Filed this..... day of 1925.

F. D. MOXCKTON, Clerk.

By....., Deputy Clerk.

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No. 4660

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CHUN NGIT NGAN,

Plaintiff-in-Error,

VS.

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, A NEW JERSEY CORPORATION,

Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT
OF THE TERRITORY OF HAWAII

STATEMENT OF FACTS

This cause is an action at law to recover the sum of Five Thousand Dollars (\$5000.00) and interest upon an insurance policy.

On May 1, 1922, Yuen Tai Kam insured his life with The Prudential Insurance Company of America in the amount of Five Thousand Dollars (\$5000.00) payable to Chun Ngit Ngan, his wife, who brings this action.

The policy contained the following provision :

“INCONTESTABILITY. — This Policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the Insured be misstated the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age.” (R. p. 6.)

The insured died of tuberculosis on February 5, 1923, at Leahi Home, a sanitarium for the care of tubercular patients.

On April 7, 1923, after the death of the insured and within the period of one year from the issuance of the policy, The Prudential Insurance Company of America (hereinafter called the Company) made a tender to the beneficiary, plaintiff and plaintiff-in-error herein, of the amount of the first premium, the only amount therefore due and which had been paid by the insured, notifying the beneficiary that the insured had made certain misrepresentations, hereinafter referred to, to obtain the policy; that it considered the policy invalidated by fraud; that it refused to be bound by the policy or to pay the insurance covered thereby, and thereupon demanded of her the return of the policy (R. p. 87.) No legal proceedings of any nature were taken by the Company

to cancel or rescind the policy within the year following the date of its issuance. (R. p. ~~14~~¹⁷.)

On April 11, 1923, a petition for the appointment of an administrator of the Estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter, on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified. (R. p. ~~17~~⁴.)

On June 27, 1923, Chun Ngit Ngan, the beneficiary brought this action under the insurance policy, to recover the Five Thousand Dollars. (R. p. ~~1~~—.)

The cause was tried before one of the judges of the Circuit Court of the First Judicial Circuit, who rendered an opinion holding that the insured had made in his application for the policy false and fraudulent representations concerning his health; that such false representations were material, and induced the granting of the policy. But the court also held that the Company having failed to institute appropriate legal proceedings within one year after the issuance of the policy had failed to “contest” the same within the meaning of the insurance contract, and therefore could not in this action contest payment. (R. p. ~~10-12~~—.)

From the judgment entered upon this decision of the trial court the Company took its writ of error. (R. p. ~~99~~—.) The Supreme Court of the Territory, in a decision from which the Chief Justice dissented, reversed the trial court, holding that the terms of the insurance policy did not require a legal proceeding to constitute a “contest” of the policy within the year after its issuance, and that the tender to the bene-

ficiary of the premium paid by the insured, together with the declaration that it considered the policy invalidated by the misrepresentations of the insured and the demand for the return of the policy, constituted a contest. (R. p. ~~164-174~~)

Following the entry of the Supreme Court's decision, Chun Ngit Ngan petitioned for a rehearing upon the grounds among others that the hypothesis adopted was opposed to the great weight of authority, and that the question was determined without being raised or argued by counsel. (R. p. ~~163~~.)

The court declined to grant a rehearing upon the ground that, although the hypothesis was not one upon which counsel had an opportunity to be heard, nevertheless it was not material to the decision of the case. (R. p. ~~167~~.) The Chief Justice dissented upon the ground that the case was a clear one on the point involved which was material to the decision and which had not been raised or argued by counsel on either side, declaring that it thus fell within Section 2259, R. L. 1915, being Section 2232, R. L. 1925, which reads as follows:

“Sec. 2232. Additional argument by counsel. Upon all questions arising under the exercise of the jurisdiction of the supreme court, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such argument to be had. And after the argument of any cause, or when the same is submitted on briefs, if the court is of opinion that a certain

point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court."

Thereafter the cause was remanded to the trial court for further proceedings and a second judgment was entered, this time in favor of the defendant, the Company. The second judgment was rendered without trial, the parties stipulating the additional fact, which was not proved in the first trial, of the petition for and appointment of the administrators of the Estate of Yuen Tai Kam. (R. p. 175.)

This second judgment was entered without findings in the decision of the court, other than that it was based entirely upon and governed by the decision of the Supreme Court. (R. p. 175.) To this judgment plaintiff directed her writ-of-error and again brought the cause before the Supreme Court of the Territory of Hawaii. Without considering any further contentions raised by counsel, the court, upon the reasoning contained in the former opinion, affirmed the judgment of the trial court for the defendant, Chief Justice Peters again dissenting. (R. p. 192, 194)

It is upon these facts that the plaintiff is now before this Court as the plaintiff-in-error in this cause, seeking the reversal of the second judgment entered in the trial court and affirmed by the Supreme Court of the Territory of Hawaii.

ERRORS RELIED ON

The following errors are assigned (R. p. ~~209~~):

ERROR No. 1

That the court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated March 31, 1925;

ERROR No. 2

That the court erred in making and entering its judgment on the 12th day of May, 1925, affirming the judgment of the Circuit Court of date March 31, 1925;

ERROR No. 3

That the court erred, in its opinion and decision of December 11, 1924, in holding that the insurance company had instituted a contest of policy within one year from the date of the policy;

ERROR No. 4

That the court erred, in its opinion and decision of December 11, 1924, in holding that the defense of fraud was available in the above entitled cause;

ERROR No. 5

That the court erred, in its opinion and decision of December 11, 1924, in holding that the ordinary, every day meaning of the word incontestable leads to the conclusion that the insurance company had contested the policy within a year after the date of the policy;

ERROR No. 6

That the court erred, in its opinion and decision of December 11, 1924, in holding that there was not any

difficulty in ascertaining what the ordinary meaning of “incontestable” is;

ERROR No. 7

That the court erred, in its opinion and decision of December 11, 1924, in holding that there was absolutely nothing in the policy to show that the word “incontestable” or its inferential antonym “contestable” was not used in its ordinary acceptance or was used only in its narrower meaning as an attack in court;

ERROR No. 8

That the court erred, in its opinion and decision of December 11, 1924, in holding that there is no provision in the policy to the effect that the “contest” which is permitted within the first year shall be by judicial proceedings only;

ERROR No. 9

That the court erred, in its opinion and decision of December 11, 1924, in construing the words “incontestable” and “contestable” according to the meaning which it held was intended by the lawyers for the insurance company instead of construing such words most strongly against the party providing the policy;

ERROR No. 10

That the court erred, in its opinion and decision of December 11, 1924, in holding that the origin and purpose of the clause of incontestability in policies are not open to doubt;

ERROR No. 11

That the court erred, in its opinion and decision of December 11, 1924, in holding that as the word "incontestable" is undoubtedly used in the policy as meaning indisputable in any way whatsoever, *i. e.*, in court or out of court, so also the inferential antonym "contestable" means disputable by any or every method which constitutes a dispute or attack, *i. e.*, in court or out of court;

ERROR No. 12

That the court erred, in its opinion and decision of December 11, 1924, in holding that the clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period, and that, therefore, as to the latter, the rights of the insurer are as broad as they would have been if a clause of incontestability were not in the policy, and that therefore, without that clause those rights for the first year would have included the right to dispute or attack out of court as well as in court;

ERROR No. 13

That the court erred, in its opinion and decision of December 11, 1924, in holding that there is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates how it may be contested within the year;

ERROR No. 14

That the court erred, in its opinion and decision of December 11, 1924, in holding that the policy is contestable other than judicially during the first year;

ERROR No. 15

That the court erred, in its opinion and decision of December 11, 1924, in repudiating what is recognized as an overwhelming weight of authority;

ERROR No. 16

That the court erred, in its opinion and decision of December 11, 1924, in holding that the policy does not specify a contest in law and does not specify any particular mode of contest whatever;

ERROR No. 17

That the court erred, in its opinion and decision of December 11, 1924, in holding that the rule that the language of a policy, because it was chosen by the insurer is in case of ambiguity to be taken most strongly against the insurer was not applicable in this case, because there is a statute of this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from the insurance; and in holding that the language of the policy under these circumstances is deemed not to be that of the insurance company;

ERROR No. 18

That the court erred, in its opinion and decision of December 11, 1924, in setting aside the judgment of the Circuit Court of the First Judicial Circuit of date May 12, 1924;

ERROR No. 19

That the court erred, in its decision of December 11, 1924, in granting a new trial;

ERROR No. 20

That the court erred, in its opinion and decision of January 8, 1925, in refusing a rehearing of the cause ;

ERROR No. 21

That the court erred, in its opinion and decision of January 8, 1925, in holding that the decision of the court of December 11, 1924, that any ambiguity in the policy was not to be construed against the insurance company was not material to the decision ;

ERROR No. 22

That the court erred, in its decision of January 8, 1925, in holding that a rehearing or reconsideration of the point whether any ambiguity should be construed against the insurer could not possibly affect the conclusion of the court that the judgment of the Circuit Court of May 12, 1924, must be reversed ;

ERROR No. 23

That the court erred, in its decision of May 12, 1925, in affirming the judgment of the Circuit Court of March 31, 1925, upon the reasoning contained in the opinion of the Supreme Court of December 11, 1924 ;

ERROR No. 24

That the Supreme Court erred in failing to reverse the judgment of the Circuit Court of the First Judicial Circuit of March 31, 1925 ;

ERROR No. 25

That the Supreme Court erred in reversing the judgment of the Circuit Court of the First Judicial Circuit of May 12, 1924.

ARGUMENT

I.

THE ISSUE

The one substantial issue before this court is the question :

Does the tender of premiums to the beneficiary and the demand for the return of the policy made within the contestability period constitute a contest within the meaning of the policy?

It is admitted that the Company, within a year after the issuance of the policy, tendered back the premiums to the beneficiary and demanded the return of the policy. The plaintiff contends that this did not constitute a contest; that, to constitute a contest, some legal proceeding was necessary, either the institution of a suit by the Company or a defense to a suit by the beneficiary. The Company, on the other hand, contends that its conduct in tendering back the premiums paid and demanding a return of the policy was a contest within the incontestability clause, and thus was a full defense to a suit brought by the beneficiary after the expiration of the year from the issuance of the policy.

As the main issue itself is involved in all the sub-headings of the argument, so there are certain assignments of error which are general and apply to each phase of the discussion. These are assignments of error numbers 1, 2, 3, 4, 14, 16, 18, 19, 23, 24 and 25.

II.

ANY AMBIGUITY IN THE POLICY IS TO
BE CONSTRUED FAVORABLY TO THE
INSURED.

The errors assigned as numbers 17 and 9 particularly present the question of the construction of the policy which should govern.

The first trial of this cause resulted in a judgment in favor of the plaintiff upon the one substantial point in issue: That is, that no contest had been instituted by the defendant prior to the expiration of one year after the policy was issued. This judgment was reversed by the Territorial Supreme Court in its first decision, and it is upon the basis of that decision that all the subsequent proceedings, resulting in the entering of final judgment in favor of the defendant, rest. Any error therefore in the original decision of the Supreme Court is basic, and goes to the root of the second judgment entered in favor of the defendant.

The Supreme Court of the Territory founded its first decision upon the purported axiom that the principle, which construes any ambiguity in insurance policies in favor of the insured, did not apply to the case at bar by reason of the fact that the statutes of the Territory of Hawaii provide for a standard life insurance policy. (R. p. 106.)

The standard policy requirement referred to reads as follows:

“A provision that the policy shall constitute the entire contract between the parties, and

shall be incontestable not later than two years from its date, except for nonpayment of premiums. . . .”

R. L. 1925, Sec. 3464 (3).

It is submitted that the reasoning of the Supreme Court on this fundamental point upon which all subsequent reasoning of the court was based, is erroneous in two particulars: First, in that the incontestable clause in the policy of this cause is not dictated by the statute; and second, in that the adoption by the statute of a standard policy embracing clauses long contained in insurance policies and receiving repeated judicial construction prior to the enactment of the statute, does not affect the principle of construction that the policy must be interpreted in all cases of ambiguity most favorably to the insured.

Upon the first point, the court will note that the statute is a broad one and merely sets the limits within which the parties may contract. It declares that there must be an incontestable clause of not more than two years but it leaves to the judgment of the parties the time within that period which the insurance company may have to contest.

The insurance company incorporated into its contract in this case a provision rendering the policy incontestable, except for non-payment of premiums, after *one year* from its issuance, thus making the clause a purely contractual one subject to the usual construction of such contracts, that is, the solution of all ambiguity in favor of the insured. All that the statute required was some incontestable clause

not to exceed two years. The insurance company chose to act well within the limit, thus freeing its contract with the insured from any implication of a necessity imposed by statute.

If such a clause is to be released from the requirement of construction favorable to the insured, it can only be upon the ground of statutory necessity, the laying upon the insurance company of an absolute requirement by the statute which gives the company no option in the matter and therefore releases it from any unfavorable implications arising through the adoption of the statutory requirement.

In this case, however, the terms of the policy show that the company felt itself under no obligation under the statute. It went further than any statutory requirement and, as an inducement to the insured, inserted an incontestability clause of one year. Thus the argument arising from necessity has no application, and the old principle long sanctioned by the courts that insurance contracts are to be construed in favor of the insured has complete application.

Upon the second point, also, the court erred. One of the cases cited in the briefs before the court, is seized upon to supply the assumption which the court asserts that the usual construction of a policy favorably to the insured does not apply where the statute requires a standard form.

At this point a digression may be excusable to disclose briefly an error which will be later developed under a separate assignment.

The court passed upon this fundamental question of the principle of construction to be applied, without the matter having been raised or argued by counsel. This, in itself, constituted an error under the statutes of Hawaii, as will be shown later. But it also grievously handicapped the court in its consideration of the question. Had the point been raised by counsel or called to counsels' attention by the court, the authorities would have been exhaustively presented and the question heard upon its legal merits. As it was, without a careful examination of the law, or advising counsel that the point was under consideration, the court based its entire reasoning upon an assumption drawn from, but not adopted by, one of the cited authorities, an assumption discredited both by reason and authority.

The best reasoning, as well as weight of authority, supports the view that the action of legislatures in passing statutes requiring standard policies was still to protect the insured and not to secure to the insurer an advantage from the construction of its own instruments which it never would have had in the absence of statute.

Statutory requirements of standard policies are based upon the purpose of the legislature to secure protection to the insured in their contracts by having incorporated therein the general terms and safeguards which have been inserted in policies through long experience and sanctioned through long judicial construction. The purpose of such enactments is not to deprive the insured of that fundamental right of

favorable construction which arises from the fact that the insurance companies use their own language, but rather as an additional protection to the insured. The reason for favorable construction to the insured remains the same. The language of the policy is not dictated by the legislature, it is still the work of art of experienced insurance men trained to use terms of art, and in such fashion that their companies may receive every benefit from the language of the policy which their efforts can give. The reason for the protective construction favorable to the insured thus remains the same. No revolution of construction depriving the insured of one of his most substantial rights should arise from the statutes which were intended rather to protect him than to deprive him of the shield which the law has developed.

This has nowhere been better expressed than in *Vance on Insurance*, page 430, adopted in *Gazzam v. German Union Fire Insurance Co.*, 155 N. C. 330, 71 S. E. 434, 437; and in *Ins. Co. of North America v. O'Bannon*, Tex. Civ. A., 170 S. W. 1055:

“It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer cannot be regarded as selecting the terms of the contract, and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the con-

struction given by the precedent cases to similar terms in other policies, and therefore ought to be regarded as being used in the sense of their previous construction. It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests."

If a doubt exists as to the meaning of a policy it should be resolved in favor of the insured rather than in the interest of the insurer. The Standard Policy Act does not modify this principle, as the subject matter of the insurance is still expressed in the language of the insurer.

Levinton v. Ohio Farmers Ins. Co., 267 Pa. 448,
110 Atl. 295.

Matthews v. American Cent. Ins. Co., 154 N. Y.
449, 48 N. E. 751.

Maisel v. Fire Ass'n of Philadelphia, 69 N. Y.
Supp. 181.

It is not to be presumed that the legislature intended, by prescribing the form of contract and prohibiting any other, to give it effect in depriving a party of rights which as a contract it would not have had.

Dunton v. Westchester Fire Ins. Co., Me., 71 Atl.
1037.

Contracts of insurance are construed against the insurer and in favor of the insured and this has not

been changed by the adoption of a standard form of insurance policy.

Cottingham v. Md. Motor Car Ins. Co., 168 N. C., 259, 84 S. E. 274.

Johnson & Stroud v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124.

Smith v. National Fire Insurance Co., 175 N. C. 314, 95 S. E. 562.

Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 Atl. 525.

Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80.

Leisen v. St. Paul F. & M. Ins. Co., N. D. 127, N. W. 837.

The New York cases are especially significant inasmuch as the standard form of policy of Hawaii has been adopted from New York and the incontestability clause referred to in both standard policies of Hawaii and New York is identical. The New York statute in force at the time of the declaration by the New York courts of the rule that the adoption of the standard policy by the legislature, did not affect its interpretation favorably to the insured, and in force also at the time of its adoption by the Legislature of Hawaii, reads as follows:

"Birdseye's Cumming and Gilbert's Consolidated Laws of New York, ann. Vol. II, p. 2592 (1913).

S. 101. Standard provisions. On and after January first, nineteen hundred and ten, no policy of life or endowment insurance shall be

issued or delivered in this state unless and until a copy of the form thereof has been filed with the superintendent of insurance and formally approved by him; nor shall such policy except policies of industrial insurance where the premiums are payable weekly, be so issued or delivered unless it contains in substance the following provisions:

.

2. A provision that the policy shall be incontestable after two years from its date of issue except for nonpayment of premium and except for violation of the conditions of the policy relating to military or naval service in time of war."

Thus, under the rule that the adoption of a statute carries with it the judicial construction of its effect, the Hawaiian legislature enacted, with the standard policy the rule that the language thereof was still to be construed in all cases of ambiguity favorably to the insured.

Territory v. Pacific Coast Casualty Co., 22 Haw. 446, 453.

It is submitted, therefore, that all ambiguities should be construed favorably to the insured.

"The rule is settled that, in case of ambiguity, that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company, and it is consistent with both reason and justice that any fair doubt as to the mean-

ing of its own words should be resolved against it. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 678, 679, 24 L. ed. 563, 565; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 462, 38 L. ed. 231, 235, 14 Sup. Ct. Rep. 379."

Mutual Ins. Co. v. Hurni Co., 263 U. S. 167, 174.

III.

THE RULE THAT IN CASE OF AMBIGUITY
THE LANGUAGE OF AN INSURANCE
POLICY IS TO BE TAKEN MOST
STRONGLY AGAINST THE INSURER,
SHOULD NOT HAVE BEEN REPUDIAT-
ED WITHOUT GIVING COUNSEL A
CHANCE TO BE HEARD.

The discussion of this branch of the cause falls particularly within assignments of error numbers 17, 20, 21 and 22.

The first statement of law in the decision of the Supreme Court of December 11, 1924—the decision upon which all the issues in the case are founded—was that by virtue of the adoption of a standard insurance policy in Hawaii, the well recognized rule that in cases of ambiguity insurance policies are to be construed in favor of the insured did not apply. This question was neither raised in the assignments of error before the Supreme Court nor was it argued in any manner by counsel; yet the Supreme Court

used it as a hypothesis upon which it based its decision.

An examination of points 1 and 3 (particularly 3) in the opinion of the Supreme Court of Hawaii of December 11, 1924, shows what a large part was played in the decision of the case by the assumption of the Supreme Court that the rule requiring ambiguous phrases to be construed in a manner most favorable to the insured did not apply. Section 3 of the opinion shows clearly that the court, far from construing the policy favorably to the insured, adopted exactly the opposite interpretation and construed it favorably to the insurer. The court, as a basis of its argument, used exactly the reasoning that has led judges, ever since the inception of insurance policies, to indulge in constructions favorable to the insured. That is, the Hawaiian court considered the fact that the incontestability clause was drawn by the ablest lawyers available to insurance companies; that the clause was intended to further the interests of the insurance companies and so should be construed to favor those interests.

It is the very fact that insurance policies are drawn by the ablest lawyers the companies can command that has laid upon courts, in the requirements of justice, the necessity of construing any questionable words or phrases so as to protect the insured.

It was upon the ground that a material part of the case was thus decided, without permitting counsel to be heard, that the insured requested a rehearing under the rules of the court. (R. p. ~~163~~).

The theory of the petition for rehearing was that petitioner had been foreclosed of a substantial right in violation of Section 2232, R. L. 1925 (Appendix) forbidding the determination of a case upon any point material to the decision, which had not been raised or argued by counsel on either side, until counsel for both sides have had an opportunity of arguing the same before the court.

The court considered the petition for rehearing but declined to grant counsel an opportunity to be heard on the ground that the determination by the court in the decision of December 11, 1924, that the rule of construction requiring ambiguities to be interpreted favorably to the insured, did not apply, was not material to the case. (R. p. ~~164~~ 167.)

An examination of the opinion of December 11th (R. p. ~~164~~), however, as the insured has attempted to demonstrate, indicates how strongly the court relied upon the non-application of that rule in order to reach its conclusion. In portions of its argument the court develops the theory that the incontestability clause is not ambiguous because it clearly means not only "litigate" but other forms of protest. But litigation and other forms of protest are in themselves different species of "contest," and establish that double meaning which in itself constitutes ambiguity. Again, the court in reaching the conclusion that "contest" (and its derivatives) is unambiguous when used in an insurance policy, has emphasized the fact that the words were selected by the ablest lawyers available to the Company and,

therefore, should be construed most favorably to the Company for that was undoubtedly what the lawyers intended. So runs the argument of the Hawaiian Court which, to the mind of counsel, establishes the basic materiality to the court's conclusion, of the repudiation of the rule of construction favorable to the insured.

It is submitted, that the Supreme Court based the major part of its argument on the material assumption that the policy was not to be construed favorably to the insured and that the court erred not only in adopting such an assumption but in adopting it without permitting counsel to be heard upon the merits thereof.

IV.

THE COURT ERRED IN HOLDING THAT THERE WAS NO AMBIGUITY IN THE INCONTESTABILITY CLAUSE AND THAT "CONTEST," OR RATHER ITS "INFERENTIAL ANTONYM," "INCONTESTABLE," MEANT "NOT TO BE DISPUTED IN ANY WAY, WHETHER IN COURT OR OUT OF COURT."

This branch of the subject is covered by assignments of error numbers 10, 5, 6, 7, 8, 9 and 11.

The primary thesis of the court in determining that the insurance company had instituted a contest within a period of one year from the issuance of the policy was that there was no ambiguity in the incontestability clause, that the clause meant any type of protest, whether in or out of court.

In developing its argument, under section 1 of the court's opinion (R. p. ¹⁰⁶⁻¹⁰⁸—) the various definitions of "contest" and its derivatives and antonyms were discussed. The court particularly emphasizes that each definition contains a number of possible meanings, the meaning "litigate" being one of those meanings. Indeed, the primary meaning of "contest" is "litigate." The word contest comes from the Latin *contestare*, meaning "to call to witness, bring an action." (Century Dictionary Encyclopaedia.)

The court overlooked, however, in consulting the dictionaries, the definition of the word "ambiguous." The term "ambiguous" in its very essence means "capable of being understood in more senses than one."

"Ambiguous—Capable of being understood in more senses than one; obscure in meaning through indefiniteness of expression; having a double meaning. . . ."

"Ambiguity—The quality of being ambiguous, obscure, or uncertain, in meaning, especially where either of two interpretations is possible. . . ."

Punk & Wagnall's New Standard Dic. of the Eng. Language (1915).

"Ambiguous—Capable of being understood in either of two or more possible senses.

"Ambiguity—Duplicity in meaning. . . ."

Webster's New International Dictionary (1923).

Yet because the word "contest" or "incontestable" is demonstrated by the court to its own satisfaction as being capable of being understood in more senses than one, or as having a possible choice of one or more interpretations, the court jumps to the conclusion that the clause is therefore *not* ambiguous but must clearly have embraced every one of those meanings.

Those words only can be called unambiguous which have but one meaning and the definition of which is given in synonyms, each synonym of the original word being a synonym of the other definitions. When a word is ambiguous, however, the synonyms of the original word need not be synonyms of each other. One of the ultimate tests of whether a word is ambiguous or not lies in the determination of whether the various other words that it means are all equivalent to each other or mean different things. If they mean different things in different circumstances, then the word is ambiguous and must be construed according to its surroundings.

The word "contest" is typically ambiguous, meaning different things to different men, under different circumstances. Thus, being ambiguous, that meaning which is most favorable to the insured, that is the requirement of litigation, should be given it when construing the policy drawn in the language selected by the insurer.

The court having determined that the incontestability clause was unambiguous then went a step

further and held that the word "contest" and its derivatives, as used in such a clause, is unambiguous because it is not restricted to proceedings in court but includes all methods of protest.

This decision was reached in the face of what the court recognized as an overwhelming weight of numerical authority, the major part of the courts of the United States having judicially determined that contest in such a clause can mean nothing but a judicial determination, or court proceedings.

It is submitted, that if the word "contest" is unambiguous in the light of its history and judicial interpretation, it can only be because, as the court said in *Ramsey v. Old Colony L. Ins. Co.* 297 Ill. 592, 131 N. E. 108, adopted in *Humpston v. State Mut. L. Assur. Co.*, Tenn, 256 S. W. 438, 443:

"The language is not ambiguous. It admits of no reasonable construction, as the courts have said in the cases already cited, other than that the company may have one year, and no more, for the investigation of the questions material to its risk, and if it does not within that time, either as plaintiff or defendant, contest the policy, it cannot do so afterward. Such contest can be made only by proceedings in court to which the insurer and the insured or his representatives or beneficiaries, are parties."

To say that a word or clause in an insurance policy is not only unambiguous but has a meaning that has been repudiated by a long line of judicial authority

appeals to the plaintiff-in-error as faulty logic. The meaning either should be settled by the great weight of authority, or, if that is not absolutely decisive, it may be ambiguous. It surely cannot be a correct method of reasoning to say there is no ambiguity in the phrase, but that it means something which the repeated decisions of the courts of highest standing have declared it cannot mean. The beneficiary earnestly contends that the decision of the Supreme Court of Hawaii is impaled upon the horns of a dilemma. Either the incontestability clause is ambiguous, in which case the court erred in failing to allow counsel to be heard upon the most material point of whether the adoption of a standard policy nullifies the rule that ambiguities are to be resolved favorably to the insured; or else it is not ambiguous because the meaning has been settled by a series of judicial decisions which have interpreted the clause to require a contest by litigation alone.

V.

THE REQUIREMENT OF "CONTEST" WITHIN THE INCONTESTABILITY CLAUSE OF A POLICY IS OF JUDI- CIAL ACTION.

This branch of the argument is particularly covered by assignments of error numbers 5, 6, 7, 8, 10, 11 and 15.

Many of the state courts, as well as the Federal tribunals, have passed upon the incontestability clause of insurance policies. The fact that this clause

has been so widely adopted and so frequently construed shows how little it has been affected by the requirement of a standard policy. In other words, it is the choice of the insurance companies.

These courts have almost uniformly construed that clause to require the insurance companies to either rescind the policies before the termination of the limitation period or else to bring legal proceedings looking to a decree of rescission. When rescission is spoken of as apart from judicial action, a concurrence of will of the parties is meant.

The Hawaiian Court recognized that the overwhelming numerical weight of authority was against it, but based its decision on what it called the weight of authority in reason. (R. p. ¹⁰⁴⁻¹²⁴!) We will attempt to show that the only cases supporting the construction of the Hawaiian court are of minor authority as coming from intermediate courts or as being more dictum than anything else.

A.

"CONTEST" JUDICIALLY DEFINED

The courts of Illinois, Indiana, Missouri, Oklahoma, North Carolina, Tennessee, Arkansas and Michigan, the United States Circuit Courts of the fourth and fifth circuits, and of the District Courts of Kansas, as well as, inferentially at least, the United States Supreme Court have all construed the incontestability clause to require a contest in a judicial proceeding.

Within a year of the date of the policy, the insured in the meantime having died, the insurance company

denied liability on the policy, but took no judicial action. In an action on the policy after the year had elapsed the court held that no defense of breach of warranty could be made by the insurer, as the policy contained the one year incontestability clause. The court said :

“Incontestable means not contestable. A contest in law implies an adversary proceeding in which matter in controversy may be settled by the courts upon issue joined.”

Missouri State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S. W. 66, 69.

In North Carolina the court has held :

“Where a policy of life insurance, containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premium, has been delivered and the premium paid therefor, an attempt by the insurer within that time, upon notification to the insured, to cancel the policy with tender of repayment of the premium upon a different ground than that stated in the clause, but not consented to or accepted by the latter, is a breach of the contract by the former ; and it is necessary for the insurer, within the stated time, to bring suit in equity for the cancellation of the policy, or it will remain binding and enforceable upon the insured’s death.”

Trust Co. v. Insurance Co. 173 N. C. 558, 92 S. E. 706.

Hardy v. Phoenix Mut. Life Ins. Co. 180 N. C 180, 104 S. E. 166, 168, cited in *Hurni Packing case*, 263 U. S. 167, 68 L. Ed. 45, 48.

The Circuit Court of Appeals of the Fifth Circuit has held:

“A contest so provided for imports litigation, the invoking of judicial action to cancel or prevent the enforcement of the policy, either by a suit to that end or by a defense to an action on the policy. A mere denial or rejudication by the insurer of its liability under the policy, accompanied by a tender of the premium paid, is not a contest, within the meaning of the provision.”

Northwestern Mut. Life Ins. Co. v. Pickering, 293 Fed. 496, 499 certiorari denied 68 L. Ed. 258.
Jefferson Standard L. Ins. Co. v. McIntyre, 294 Fed. 886.

Repala v. John Hancock Mut. Life Ins. Co., 229 Mich., 463, 201 N. W. 465.

In Tennessee, the Supreme Court adopted the language of the trial judge:

“It takes two to make a contract and likewise it takes two to rescind one (*Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981), or the judgment of a court of competent jurisdiction at the instance of the party having a good ground for rescission. It is true that the defendant undertook to rescind the contract in this case upon the ground of complainant’s fraud in procuring it, on August 29, 1922, by deliver-

ing to complainant on that date a written notice to that effect and demanding the surrender of the policy. But complainant refused to agree to the rescission and refused to surrender the policy. The contract was therefore not rescinded merely by the act of the defendant in giving said notice. It was open to the defendant thereafter to repent of its act and treat the policy as in full force and effect, or it might elect to have its right to rescind tested and enforced by a court, either by itself instituting a suit for that purpose or by interposing it as a defense if sued. In my opinion it takes the one or the other of these steps to constitute a contest of the policy within the meaning of the statute and the contractual limitation found in the policy. In the instant case this was not done until the answer and cross-bill was filed on October 16, 1922, which was after the one year had elapsed in any view of the date of issue of the policy."

Thistle v. Eq. Life Ass. Soc. (Tenn.) 261 S. W. 667.

In Illinois the court held:

"Such contest can be made only by proceedings in court to which the insurer and the insured, or his representatives or beneficiaries are parties."

Ramsey v. Old Colony Life. Ins. Co., 297 Ill. 592, 131 N. E. 108, 110; cited in *Hurni Packing Case*, 263 U. S. 167, 68 L. Ed. 45, 48.

See *LaVelle v. Metropolitan Life Ins. Co.*, 209 Mo. A. 330, 238 S. W. 504.

The Oklahoma court has held:

“Certainly, in the absence of authority contained in the contract of insurance, the insurer was without power to determine as to the truthfulness of statements contained in the application for insurance, and to declare the policy forfeited. If the insurer desired to avoid the policy, on the ground of misrepresentations contained in the application for insurance, it should, in the absence of the consent on the part of the insured and the beneficiaries named in the policy, have taken legal steps to do so within two years from the date of issuance of the policy, and, failing so to do within two years from the date of the issue of the policy, the policy of insurance was incontestable on the ground of breaches or warranties contained in the application.”

Mutual Life Ins. Co. v. Buford, 61 Okl. 158, 160 Pac. 928.

See also

Powell v. Mutual Life Ins. Co., 313 Ill. 161, 144 N. E. 825.

New York Life Ins. Co. v. Adams, Ind. App., 145 N. E. 499.

Reliance Life Ins. Co. v. Thayer, 84 Okl. 238, 203 Pac. 190, 193.

In addition to the cases actually defining the term “contest,” in the incontestability clause, as begin-

ning court action, there are numerous cases which, while not expressly defining the term, do not hold that nothing short of judicial action is enough.

In *Jefferson Standard Life Insurance Co. v. Keeton*, 292 Fed. 53 (C. C. A. 4th Circuit), it appeared that the policy of insurance was issued in April, 1921; that the insured died August 26, 1921; that on November 28, 1921, the insurer tendered back the premiums and demanded surrender of the policy for false statements made in the application. The demand was refused, and on the next day the Company filed its proceeding in equity to cancel the policy. The court held that it was properly filed, as had they waited to bring suit or to defend suit until more than a year had lapsed, the incontestability clause would apply, and the Insurance Company could have made no defense.

In *Plotner v. Northwestern National Life Insurance Co.*, 48 N. D. 295, 183 N. W. 1000, the policy contained the usual provision that it should be incontestable except for nonpayment of premiums, and was dated July 28th, 1919. The insured died December 15, 1919. Due proof of death was furnished the Company, and it declined to pay. Suit was commenced on July 31, 1920, on the policy. The court held that the company could not rely upon the incontestability clause because it permitted a year and more to expire before it took any action to avoid or rescind the policy.

In *Humpston v. State Mutual Life Assur. Co.*, 148 Tenn. 439, 256 S. W. 438, the court held that a letter

written by the Insurance Company to a beneficiary under a life policy, after death of insured and proof of claim, refusing to pay the claim, did not rescind the policy within the incontestability clause.

In *Ebner v. Ohio States Life Ins. Co.*, 69 Ind. App. 32, 121 N. E. 315, the Insurance Company brought an action to cancel the policy within the contestability period. The court held that the insurer had the right to its action to cancel the policy in equity within the period named in the incontestability clause, on the ground that the remedy by defending an action on the policy is inadequate. That the bringing of proper action within the contestability period is necessary.

In *American Trust Co. v. Life Insurance Co.*, 173 N. C. 558, 92 S. E. 706, the court held that if there is reasonable doubt as to the extent of the application of the incontestable clause, it must be solved in favor of the beneficiary (citing, *Mareck v. Life Asso.* 62 Minn. 39; 54 A. S. R. 613; *Royal Circle v. Achterrah* 204 Ill. 549; 63 L. R. A. 452); and that under an incontestability clause, the insurance company must take affirmative action within the period of contestability, and that the manner in which it must take affirmative action is by taking legal action (citing *Wright v. Benefit Association*, 43 Hun. 65. Affirmed 118 N. Y. 237, 16 A. S. R. 749).

In *Great Western Life Assurance Co. v. Snavelly*, 206 Fed. 20 (C. C. A. 9th Circuit), the court held that an incontestable clause precludes any defense after the expiration of one year on account of false statements warranted to be true, although it may have

been made for a fraudulent purpose; that such clause constitutes in effect a short period of limitation which it is perfectly competent for the parties to agree upon.

B.

THE AUTHORITY OF THE FEDERAL COURTS REQUIRES A JUDICIAL CONTEST

The Federal Authorities, although from several jurisdictions, are harmonious, with two exceptions, to the effect that the incontestability clause in the policy of insurance requires a judicial action to constitute a contest.

We have already cited *Jefferson Standard Life Insurance Company v. Keeton*, 292 Fed. 53; *Northwestern Mut. Life Ins. Co. v. Pickering*, 293 Fed. 496, 499; *Jefferson Standard Life Insurance Company v. McIntyre*, 294 Fed. 886, holding that judicial action is required to contest the policy.

In addition, the principle has recently been adopted in the District Court of the United States for the District of Kansas, 1st Division, in the case of *Harwi v. Metropolitan Insurance Company*, 297 Fed. 479, upon the authority of *Mutual Life Insurance Company v. Hurni*, 263 U. S. 167, the court saying:

“However, under such policies as those involved in this case, unless an action at law may be instituted within two years from date of policy, the incontestability clause cuts off the making of such defenses.”

It is interesting to note that the two exceptions to this rule rest in a dictum, unsupported by argument

or citation of authority, in the Hurni Case, 280 Fed. 18, when it was tried in the Circuit Court, and which we believe was disapproved in substance on this point when it was affirmed on appeal in the Supreme Court of the United States, and the decision in the case of Mutual Life Insurance Company v. Rose, 294 Fed. 122, a District Court case which was decided solely upon the authority of the dictum in the Hurni Case, *supra*.

C.

THE SUPREME COURT OF THE UNITED STATES FAVORS THE VIEW THAT JUDICIAL ACTION MUST BE INSTITUTED.

That the Supreme Court of the United States approves the theory so uniformly adopted by the courts, that a contest within the incontestability clause of a policy requires judicial action, is shown by two cases in the United States Supreme Court. The first being that in *N. W. Mutual Life Ins. Co. v. Pickering*, 68 L. Ed. 258, when the Supreme Court denied a Writ of Certiorari in the *Northwestern Mutual Life Insurance Company v. Pickering* 293 Fed. 496; the *Pickering* case was decided upon this very point, so that when the Supreme Court denied a Writ of Certiorari it inferentially declined thereby to find any error in the determination of the lower court.

Again in the recent leading case of *Mutual Life Ins. Co. v. Hurni*, 263 U. S. 167, 68 L. Ed. 45, the Supreme Court in effect approved the principle that

judicial action was necessary to institute contest. It is true that in that case the question was not directly decided, but the cases sustaining the theory cited to the court were distinguished and in effect disapproved. The history of that case is as follows:

Upon the first appeal of that cause in 260 Fed. 641, the court held that the jury had been improperly directed to find for the plaintiff, there being a strong showing of misrepresentation by the insured. The incontestability of the policy was not brought to the attention of the court. Upon the second trial the incontestability clause was urged and upon appeal to the Circuit Court of Appeals again, the Court held that the clause barred the defense of false representations. It appeared from the facts that the policy was dated August 23rd, 1915, and contained a two years' incontestability clause. On July 4th, 1917, the insured died. Proofs of death and claim were properly made on August 24th, 1917. The insurance company wrote declining to pay the policy upon the ground from misrepresentation. The Circuit Court held that the contestable period ran from the date upon the policy and that no contest had been made in time. The court, without the necessity of passing upon the question inasmuch as the letter declining to pay was not written within two years, yet declared that such letter was a sufficient contest within the meaning of the policy. This dictum is supported by no citation of authorities and by no reasoning.

The United States Supreme Court granted a Writ of Certiorari and affirmed the decision of the Circuit

Court of Appeals, basing its affirmance upon two grounds:

1. That in considering the incontestability clause, that construction of the policy would be adopted which was most favorable to the insured.

2. That the incontestability clause continued to run after the death of the insured and was not suspended by his death.

As the Court found that the policy ran from the date upon it, and therefore the letter of repudiation was written after the two years from the date of its issuance had expired, it was unnecessary to pass upon the meaning of "contest."

The contention made by the defendant-in-error in the Hawaiian court and which we presume will be repeated here, is however that the Supreme Court "held in affirmance of the Circuit Court of Appeals that *although the contest was sufficient it was not made by the insurer in time.*"

In its discussion of the second ground of decision that the incontestability period continues to run after the death of the insured, the Supreme Court cites the leading cases which hold that a contest under such a clause means a legal proceeding instituted by the insurer. Justice Sutherland moreover distinguishes two of the leading cases cited in the Hawaiian court by counsel for the Mutual Life Insurance Co., and while not directly putting the ban of disapproval upon them, declares they cannot apply, because the policies in those cases contained the requirement that the policy must have been "in force"

for a period of two years before contest was foreclosed, a requirement which was not formed in the Mutual Life Policy or in the case at bar.

As counsel for the defendant-in-error disagrees with us in the application of this case we refer to judicial authority to sustain us in our construction of the case, in *Harwi v. Mutual Life Ins. Co.*, 297 Fed. 479. Judge Pollock of the Federal Court directly recognizes *Mutual Life Ins. Co. v. Hurni*, 263 U. S. 167 as authority for the principle, that to constitute a contest, the Insurance Company must institute an action at law. See also *Jefferson Standard Life Insurance Co. v. McIntyre*, 294 Fed. 886; *Mo. State Life Ins. Co. v. Cranford*, 161 Ark. 602, 257 S. W. 66, 69 (both prevailing and dissenting opinion).

D.

THE CASES RELIED UPON BY THE INSURANCE COMPANY DISTINGUISHED

In support of its argument before the Hawaiian court, the insurance company cited five cases on the main issues and discussed them at length.

The first was the *Hurni Packing* case in the United States Supreme Court, which we have already discussed.

The second was the case of the *Mutual Life Ins. Co. of New York v. Rose*, 294 Fed. 122, decided in the Federal District Court of Kentucky. There it was held that equity has jurisdiction of a suit for cancellation of a life policy during the lifetime of the in-

sured even though such suit for cancellation was brought more than two years after the issuance of the policy, although the policy contained the provision that it should be incontestable after two years from its date of issue. The case was decided upon the dictum of *Mutual Life Insurance Company v. Hurni Packing Company*, 280 Fed. 18, a case affirmed without discussing the dictum in the Supreme Court of the United States. (*Mutual Life Ins. Co. v. Hurni Packing Co.* 263, U. S. 167, 68 L. Ed. 45.) Moreover, the *Rose* case repudiates the well settled rule that an extra-judicial rescission must be acquiesced in by both parties in order to be effective.

It is submitted that the discussion in the case of *Mutual Life v. Rose* is repudiated by every case save that of the *Hurni Packing* case in the lower court, and the theory is repudiated by inference at least when that *Hurni Packing* case reached the Supreme Court of the United States; that the case overlooks the overwhelming majority of the authorities and is wholly at variance with the settled law on the subject.

The third was the case of *Markowitz v. Metropolitan Life Insurance Company*, 203 N. Y. S. 534. That case held that the incontestable clause in a policy was not effective when the insured died within the contestable period, because the rights of the parties are fixed by the insured's death. This rule has been once and for all disposed of by the *Hurni Packing* case in the United States Supreme Court, where it said that "the provision plainly is that the policy

shall be incontestable upon the simple condition that two years shall have elapsed from its date of issuance; not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event."

It is interesting to observe that the New York case declares that the only authority sustaining plaintiff is *Monahan v. Metropolitan Life Insurance*, 283 Ill. 136 L. R. A. 1918 D, 1196. That statement in itself shows the cause was not fully presented.

The fourth is *Mutual Life Insurance Company of New York v. Stevens*, Minn., 195 N. W. 913. That case was a petition for cancellation brought by the company within the contestable time as provided by the insurance policy. The court held that the action would not lie as petitioner had a good remedy at law in a defense to any action brought by the insured's beneficiary even though brought after the lapsing of the incontestable period. This was based solely upon the theory that the incontestable provision no longer applies if the insured dies within the time limited for contestability; that the rights of the parties are fixed upon the death of the insured. This theory was effectually disposed of by the decision directly against it in *Mutual Life Insurance Company v. Hurni Packing Co.*, 263 U. S. 167, 68 L. Ed. 45.

The fifth case cited by plaintiff-in-error—that of the *Jefferson Standard Life Insurance Company v. Smith*, 248 S. W. 897, a case decided not in Kentucky, but in Arkansas—has been overruled in *Missouri State Life Insurance Company v. Cranford*, 257 S. W.

66, at 68, and upon the direct authority of the Hurni Packing case.

Since the decision of this cause in our local Supreme Court, two cases have been reported which will probably be cited by the defendant-in-error. One is the case of Liebsker v. New York Life Ins. Co., Ill. App. (1924). The court in New York Life Ins. Co. v. Adams, Ind. App., 145 N. E. 499, at 503, said of this case:

“In view of the decision of the Supreme Court of that state in Powell v. Mutual Life Ins. Co., 313 Ill. 161, 144 N. E. 825, the Liebsker case cannot be considered as authoritative.”

The remarks of the court in Feierman v. Eureka Life Ins. Co. 279 Pa. 507, 124 Atl. 171, were purely obiter on this subject, as no attempt had been made to rescind or cancel the policy during the contestable period.

It is urged that none of these cases is authority for the proposition that tender of premiums and demand for the policy within the contestability period permits the company to defend on any ground, save non-payment of premiums, after the termination of the contestability period, save the Rose case, 294 Fed. 122. That case we believe to be an insubstantial authority in view of the great weight of both reason and number of cases directly supporting the contention of the plaintiff-in-error. For one thing, as has already been pointed out, the Rose case repudiates the rule that a rescission is not the act of one party

but must be reached by the concurrence of minds or by its judicial determination ; for another reason, the determination is by one judge of a Federal District Court and is opposed by at least three decisions by full circuit courts of appeal ; and for a final reason, the case has not yet been finally determined. The opinion was rendered in an intermediate stage. From the last information which the plaintiff-in-error in this case has, the Rose case is still before the court and no final judgment has yet been reached.

It is urged, therefore, that to follow this decision of a court which is not one of final resort, upon a case which has not yet reached a final judgment, would be an error of policy, particularly in view of the final determination of the principle by the courts of ultimate resort in so many of the states and by the Federal Circuit Courts of Appeal that there must be litigation to contest a policy under the incontestability clause.

VI.

THE RESCISSION OF A CONTRACT RE- QUIRES EITHER COURT ACTION OR A MEETING OF THE MINDS OF THE PARTIES.

This branch of the argument is particularly covered by assignments of error number 12 and 13.

The local court in determining that a tender back of premiums together with a demand for return of the policy constitutes a contest, argues that any protest on the part of the Company prior to the expira-

tion of one year after the policy is issued is sufficient. The opinion apparently recognizes that no rescission can be shown (R. p. ¹⁰⁴⁻¹²⁴) but meets that objection by saying that contest is a broader word than rescission, and that rescission is not necessary.

But a contest before the expiration of the year which neither acts as a rescission of the contract, nor operates to give the court jurisdiction within that year is ineffectual. At the termination of the year, by the terms of the policy itself, neither that contest nor any other—save for nonpayment of premiums—can be pleaded in defense to any action on the policy. A “contest” before the expiration of the one year limitation period is only successful if it either rescinds the policy and thus destroys the contract as such, or gives a court jurisdiction to render its decree rescinding the contract. A mere protest, a voice crying out in the wilderness, has no effect if it must instantly be stilled upon the determination of the year after the issuance of the policy.

This principle has been recognized repeatedly in judicial decisions throughout the country.

The Supreme Court of Illinois has thus expressed the requirements of a successful contest:

“Mere notice of rescission for fraud settled nothing. Actual rescission is permitted for fraud without the consent of the other party to a contract where such fraud is shown, but the right to rescind does not exist unless such fraud is proven. Charging fraud and serving notice of rescission cannot, of itself, be a

rescission for fraud. It still remains to be proven whether or not fraud in fact exists. By notice of rescission for fraud the insurer raises an issue of fact and whether the policy is still good or is canceled depends upon the decision of that issue. The law recognizes but two ways of settling issues of fact. They are by stipulation, admission, or agreement, and by proof adduced before a legal body competent to find the fact. The nature of the contract requires that an issue of this character be summarily settled and that it be not permitted to pend throughout the life of the insured." *Powell v. Mut. L. Ins. Co.* 313 Ill. 161, 144 N. E. 825.

The recent case of *Eichwedel v. Metro. L. Ins. Co.*, Mo. App., 270 S. W. 415, illustrates the point excellently. In that case, within the contestable period, the insurance company had notified the beneficiary that it would not be liable because of the insured's fraud. In consideration of the repayment to her of the premiums—which she accepted—the beneficiary expressly released the insurer from liability. After the expiration of the contestable period, the beneficiary brought suit on the policy. The court held that the beneficiary could not recover and that the company had taken the affirmative action contemplated by the policy.

The court makes it clear, however, that in the absence of a rescission—the meeting of minds for the purpose of terminating the contract—a judicial pro-

ceeding would have been necessary to prevent the incontestability provision from foreclosing the company of its right to depend upon the ground of fraud.

This is in accord with other well recognized authorities:

“Rescission is the unmaking of a contract requiring the same concurrence of wills as that which made it, and nothing short of this will suffice. Bishop on Contracts, Sec. 812; Robinson v. Pough, 86 Ala. 257, 5 So. 685.”

Clark v. American Devel. & Mining Co., 28 Mont. 468, 72 Pac. 978, 980.

“The notice of cancellation and a tender of the premium constituted a breach on the part of the defendant, usually designated as a breach of renunciation. . . . It did not in fact constitute a rescission.”

Thistle v. Eq. Life Assur. Soc., Tenn., 261 S. W. 667.

New York Life Ins. Co. v. Adams, Ind. A., 145 N. E. 499, 503.

“Certainly, in the absence of authority contained in the contract of insurance, the insurer was without power to determine as to the truthfulness of statements contained in the application for insurance, and to declare the policy forfeited.”

Mutual Life Ins. Co. v. Buford, 61 Okl. 158, 160, Pac. 928.

American Trust Co. v. Life Ins. Co., 173 N. C., 558, 92 S. E. 706.

It is respectfully urged upon this court, that even had the tender of the premiums and the demand of the policy constituted a "contest," yet it did not operate to end the contract of insurance; and that when suit was brought upon the policy after the termination of the contestable period, neither that "contest," nor any other defense save the nonpayment of premiums, could be made to the action.

VII.

THE BENEFICIARY'S RIGHTS VESTED
UPON THE DEATH OF THE INSURED.
THE FAILURE TO SECURE THE AP-
POINTMENT OF AN ADMINISTRATOR
OF THE ESTATE OF THE INSURED
BEFORE THE TERMINATION OF THE
YEAR AFTER THE ISSUE OF THE
POLICY DID NOT AFFECT THE RUN-
NING OF THE LIMITATION ON THE
INSURER'S RIGHT TO C O N T E S T ,
WHICH EXPIRED ONE YEAR AFTER
ISSUANCE OF THE POLICY.

Argument was made before the Supreme Court of the Territory, and we presume it will be made again before this court, that by virtue of the fact that no administrator of the estate of the insured qualified within the year of the issuance of the policy, that there was no one whom the insurance company could sue, and, therefore, the running of the one year contestability limitation period must have been suspended.

The argument is fallacious for two reasons : First, because the beneficiary's right vested upon the death of the insured and any suit thereafter might have been brought immediately against her ; and, second, because the contract was drawn by the insurance company, in its own language, so that had a suspension of the period intended, it would have been easy to have provided therefor. For this proposition there is authority of a first rank, the authority of a Circuit Court of Appeals of the United States, together with such support as may be gathered from a denial of a writ of certiorari by the Supreme Court of the United States.

In *Northwestern Mut. Life Ins. Co. v. Pickering*, 293 Fed. Rep. 496, 498, cert. denied, 263 U. S. 720, the court, in dealing with the contention that the running of the time limited by an incontestability clause was suspended between the date of the insured's death and the date of the appointment of his personal representative, used the following language :

“The clause in question is a contractual limitation on the insured's right to contest, except for nonpayment of premium. There is no stipulation for a suspension of the running of the limitation during the time elapsing between the date of the insured's death and the date of the appointment of his personal representative. The rights of the parties flow from the contract, which does not stipulate for a suspension of the running of the limitation.

Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386, 391.

VIII.

THIS COURT HAS FULL SCOPE TO REVIEW ALL THE QUESTIONS INVOLVED IN THE CASE SINCE ITS INCEPTION.

The entire case is open for the consideration of this court on writ of error to the Territorial Supreme Court to review a judgment of that court which on a second writ of error affirmed the judgment below entered pursuant to its mandate issued on the first writ of error.

William B. Bierce v. William Waterhouse, 219 U. S. 320, 55 L. Ed. 237.

IX.

THE ISSUE IS ONE OF GENERAL COMMERCIAL LAW. THIS COURT WILL THEREFORE NOT ALLOW ITS JUDGMENT TO BE INFLUENCED BY THE DETERMINATION OF THE LOCAL COURT.

In matters involving the interpretation of local law by the Territorial Supreme Court this court will be strongly influenced by the determination of the local Supreme Court and will affirm that decision or follow the Territorial Court's interpretation unless

there is the very clearest error. This is in analogy to the practice of appellate matters coming from state courts. In state matters, local determination of local questions is absolutely controlling upon the Federal Courts. In Territorial matters, the United States Courts of Appeal are strongly influenced though not absolutely controlled.

But where the issue upon appeal is one of general commercial law, neither in state cases nor in territorial appeals does this court follow the decisions of the local court, but decides the cause according to its own opinion of the merits.

Castle v. Castle, 267 Fed. 521, 524.

Questions involving insurance and the interpretation of insurance contracts are of a general commercial nature, upon which this court will exercise its independent judgment before deciding to affirm or reverse the decision of the local court.

Actna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356.

Carpenter v. The Providence Washington Ins. Co., 16 Peters 495, 506, 10 L. Ed. 1044, 1051.

Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 115, 45 L. Ed. 49, 58.

Thus this court in considering the issue now before it, to-wit, the meaning of an "incontestability" clause of an insurance policy, is free to approach the question with an open mind, uninfluenced by that inclination to support the local court which would govern it had the questions involved been those of purely local law.

CONCLUSION

In conclusion, it is respectfully urged upon the court that the local court erred in affirming the judgment of the Circuit Court upon the second hearing in favor of the Company, and for the following reasons :

Ambiguity in a policy of insurance should be construed in favor of the insured, nor does the requirement of a standard policy change this rule, for the language of the policy remains the language of the Company, and the period of incontestability within the limits set by the legislature is still chosen by the Company ;

The repudiation of the rule of construction favorable to the insured because of the adoption of a standard policy was material and should not have been determined, without giving counsel an opportunity to be heard ;

The incontestability clause was either ambiguous and so to be construed in favor of the insured to require litigation within the contestable period, or it was unambiguous because of the long line of judicial decisions determining that it required litigation.

A "contest" within the contestability period to be effective must result in a rescission through the meeting of minds or through litigation within that period which gives the court jurisdiction to enter its judgment or decree.

It is further respectfully urged that as the whole case is open to review in this court and as the question is not one of local but is one of general commer-

cial law, public policy should induce the court to follow the great weight of authority and give to insurance policies in Hawaii a uniformity of construction with that which they have received in so many of the states.

Respectfully submitted,

THOMPSON, CATHCART & BEEBE.

FRANK E. THOMPSON.

EUGENE H. BEEBE.

MARGUERITE K. ASHFORD.

Honolulu, T. H., October 13, 1925.

APPENDIX

REVISED LAWS OF HAWAII, 1925.

Section 2232. Additional argument by counsel. Upon all questions arising under the exercise of the jurisdiction of the Supreme Court, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such argument to be had. And after the argument of any cause, or when the same is submitted on briefs, if the court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court.

Section 3464. Standard life insurance provisions required, industrial excepted. No policy of life insurance other than industrial insurance annuities and pure endowments with or without return of premiums shall be issued or delivered in the Territory or be issued by a life insurance company organized under the laws of the Territory, unless the same shall contain in substance the following provisions:

.

(3) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war; that all

statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of the statement or statements be endorsed upon or attached to the policy when issued.

No. 4660

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHUN NGIT NGAN,

Plaintiff-in-Error,

VS.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, A NEW JERSEY CORPO-
RATION,

Defendant-in-Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

*Upon Writ of Error to the Supreme Court of
the Territory of Hawaii.*

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Filed this.....day of....., 1925.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.



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STATEMENT OF FACTS.

The brief of the plaintiff-in-error states in considerable detail and with substantial fullness the facts and the issue presented upon this writ of error. The facts are few and entirely free from dispute. A policy of life insurance containing a clause that it should be incontestable after one year from its date except for non-

payment of premium, was issued to one Yuen Tai Kam in favor of Chun Ngit Ngan, his wife, the plaintiff-in-error. Nine months later the insured died of tuberculosis. Thereafter and within a period of one year from the date of the issuance of the policy the defendant-in-error herein (hereinafter referred to as the insurer) made a tender to the beneficiary, plaintiff-in-error herein, of the amount of the first premium, the only amount which had been paid by the insured to the insurer, at the same time notifying beneficiary that the insured had made in his application for the policy certain false and fraudulent representations concerning his health; that upon the ground of such fraudulent misrepresentation made to obtain the issuance of the policy it considered the policy invalidated and refused to be bound by it or to pay upon it and demanded of the beneficiary a return of the policy.

Upon the trial the insurer introduced evidence to prove the false and fraudulent representations which had been made by the insured in his application for the policy upon which misrepresentations the insurer relied in issuing the policy. The beneficiary introduced no evidence and made no effort to resist the contention of the insured that fraud had been practiced by the insured and that such fraud would constitute a complete defense to the action. The beneficiary elected to stand squarely upon the clause relating to incontestability and insisted and still insists that it is wholly immaterial whether or not insured was guilty of fraud. Upon the trial, jury-

waived, the presiding judge filed a written opinion holding that the insured had made in his application for the policy false and fraudulent representations concerning his health and that such false representations were material and induced the granting of the policy and that but for the clause relating to incontestability the insurer would have a complete defense to the action. Judgment was entered for the beneficiary on the ground that the insurer had not not effectively contested the policy within a period of one year.

The judgment was reversed by the Supreme Court of the Territory which held that the acts of the insurer within the period of one year did constitute a contest within the meaning of the insurance contract and that, therefore, the material fraudulent misrepresentations of insured constituted a defense to the action.

The cause was remanded for retrial and a second judgment was entered, in accordance with the decision of the Supreme Court, in favor of the insurer. The second judgment was rendered without a second trial, the parties hereto, however, stipulating the additional evidence that Yuen Tai Kam, the insured, died intestate without issue, his father, Jim Jan, and his widow, the beneficiary and plaintiff-in-error herein, surviving him, said father and widow being residents of the Territory of Hawaii; that on April 11, 1923, a petition for the appointment of an administrator of the estate of said Yuen Tai Kam was filed in the Circuit Court of the First Circuit of the Territory and that thereafter on May 29, 1923, admin-

istrators of the said estate were duly appointed and qualified as such. (R. pp. 173, 174.)

The judgment was affirmed by the Supreme Court upon the reasoning contained in the former opinion. The beneficiary is now before this court as plaintiff-in-error seeking to reverse the second judgment entered in the trial court and affirmed by the Supreme Court of the Territory of Hawaii.

ARGUMENT

I. THE ISSUE.

It is undisputed that the insurer herein took within a period of one year all of the steps to renounce liability, rescind the contract and put the parties in statu quo which were possible outside of a court proceeding. The issue before this court is thus narrowed to this proposition:

Under a life insurance policy containing a clause relating to incontestability is it possible for an insurer who has a valid ground for contest and rescission on account of the fraud of the insured, to so contest the policy within the one year period, outside of court, as to afford an effective defense to an action on the policy instituted after the expiration of one year?

The beneficiary contends that to constitute a contest some court proceeding was necessary and that the acts of the insurer herein did not constitute a contest within the meaning of the policy. The insurer contends that its acts did constitute a contest and that the fraud of the

insured, therefore, operates as an effective defense to the claim of the beneficiary.

This statement of the issue is substantially in accord with the statement of the issue contained on page 11 of the brief of the beneficiary-plaintiff-in-error.

II. THE FALSE AND FRAUDULENT STATEMENTS MADE BY INSURED TO INSURER'S EXAM- INING PHYSICIAN INVALIDATED THE POLICY.

The uncontradicted evidence in this case shows that the insured practiced a fraud on the insurer and that if the insured had truthfully stated to the examining physician his physical condition and the history of his visits to and treatment by physicians during the three-year period preceding the issuance of the policy that defendant would not have issued the policy.

It is unquestionably the law that such fraud invalidated the policy and affords a complete defense to the insurer.

In holding that false statements to insurer's physician as to physical condition and as to treatment by physicians previous to the time of examination invalidate a policy and that the trial court should have directed a verdict for insurer, the Supreme Court of the United States said in a recent case:

"Material representations in an application for life insurance which are incorrect, if known to be untrue by the assured when made, and nothing else appearing, invalidate the policy issued by the insurer

relying on such representations, without further proof of actual conscious design to defraud." *Mutual Life Ins. Co. vs. Hilton-Green*, 241 U. S. 613 at page 622.

In holding on similar facts that a verdict should have been directed for insurer the Circuit Court of Appeals of the Eighth Circuit said in the recent case of *Mutual Life Ins. Co. vs. Hurri Packing Co.*, 260 Fed. 641 at page 646:

"The answer having been untrue, and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act."

A petition for a writ of certiorari in the above case was denied in 251 U. S. 556.

To the same effect are numerous decisions of which the following are a few:

Moulton vs. Am. Life Ins. Co., 111 U. S. 335, 345.
Phoenix Life Ins. Co. vs. Radein, 120 U. S. 183, 189.

Actna Life Ins. Co. vs. Moore, 231 U. S. 543, 556-557.

Metropolitan Life Ins. Co. vs. McTague, 49 N. J. Law 587, 9 At. 766.

May on Insurance, 4th ed., Sec. 181.

It is therefore perfectly clear that unless precluded by the incontestability clause, the insurer herein has, on the facts and the law, a perfect defense and that the decision of the Supreme Court of Hawaii should be affirmed.

III. ANY PRESUMPTION AGAINST THE INSURER
AS TO THE MEANING OF THE TERM "IN-
CONTESTABLE" IS UNWARRANTED BE-
CAUSE OF THE FACT THAT THE PROVISION
IS REQUIRED BY STATUTE.

The brief of the beneficiary, plaintiff-in-error, emphasizes a general rule that ambiguous clauses of insurance policies must be construed against the insurer and in favor of the insured. It is provided by a Hawaiian statute, as is set forth on pages 12 and 13 of the opposing brief, that a life insurance policy must contain a provision that it shall be incontestable not later than two years from its date except for non-payment of premium.

It is contended by the beneficiary that because the insurer provided in the policy herein that said policy should be incontestable not later than one year from its date, that therefore the insurer went further than the statutory requirement and thus made the clause a purely contractual one subject to the usual construction of such contracts. This argument, however, is obviously fallacious because the reduction by the insurer of the period of contestability from two years as required by the statute to one year as provided by this policy throws no light whatever upon the question of what was meant by the use of the term "contestable," which is the whole point at issue in this case.

In support of the proposition that "contracts of insurance are construed against the insurer and in favor of the insured and this has not been changed by the adop-

tion of a standard form of insurance policy" stated on pages 17 and 18 of her brief, the plaintiff-in-error cites six cases.

The first three are from the State of North Carolina and show upon examination no explanation or reasoning whatever in support of the extraordinary proposition. The fourth and fifth cases cited, *Chichester v. New Hampshire Fire Ins. Co.*, 74 Conn. 510, 51 Atl. 525, and *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, have no bearing upon and in no way support the proposition. The sixth case, *Leisen v. St. Paul F. & M. Ins. Co.*, 127 N. W. (Md.) 837, is eliminated because the State of North Dakota had a statute as shown on page 844 of the decision providing: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed."

Furthermore the statement is made on page 18 of the opposing brief that "the New York cases are especially significant inasmuch as the standard form of policy of Hawaii has been adopted from New York." Upon page 19 of her brief the plaintiff-in-error concludes, "Thus, under the rule that the adoption of a statute carries with it the judicial construction of its effect the Hawaiian legislature enacted, with the standard policy the rule that the language thereof was still to be construed in all cases of ambiguity favorably to the insured."

There is nothing whatever in the record to show that

the Hawaiian statute was adopted from New York or from any other state. There is before this court only the words of the statute themselves and the fact, as shown by the footnote at the end of the section in question, 3464, Revised Laws of Hawaii, 1925, that the provision under consideration was a part of Chapter 115 of the Session Laws of Hawaii of 1917. The Session Laws of Hawaii, 1917, show that said Act 115 was approved and became effective as law on April 21, 1917.

The cases are numerous to the effect that the rule that policies of insurance should be liberally construed in favor of insured because prepared by the insurer, has no application where the contract is in the form prescribed by statute.

Rosenthal v. Insurance Co. of N. A., 158 Wis. 550, 149 N. W. 155, Ann. Cas. 1916 E. 395.

Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361.

Del Guidici v. Importers' Etc. Ins. Co. (N. J.), 120 A. 5.

Mick v. Royal Ech. Assur. Corp., 87 N. J. L. 607, 91 A. 102.

Nelson v. Traders' Ins. Co., 74 N. E. 421.

Hewins v. London Ass. Corp., 184 Mass. 177, 68 N. E. 62.

The provision in the policy herein that it should be incontestable after one year from its date is, as to the incontestable feature, in compliance with the statutory mandate. The rule of construction of policies against the insurer because the policy is drafted by the insurer can have no application to the case at bar. The policy

follows the words of the statutory requirement. The reason for the rule vanishes.

The issue herein depends for solution therefore upon the intent of the Legislature of Hawaii when in April, 1917, by approval of the governor, the incontestable clause requirement became part of the insurance law of Hawaii. It is true that a number of cases have held that the term "incontestable" used in insurance policies means court action. But the attention of this court is most earnestly called to the fact that not a single case is cited by the plaintiff-in-error on this point which was decided prior to April, 1917. There was in April, 1917, no judicial construction by any court of the meaning of the term "contestable" when the Legislature of Hawaii directed that the provision should appear in all life insurance policies.

It is submitted that in this case there can be presumption against the insurer in determining the meaning of the clause relating to a contest.

IV. THE STEPS TAKEN BY THE INSURER
HEREIN CONSTITUTED A CONTEST WITHIN
THE MEANING OF THE POLICY AND REN-
DERS THE FRAUD OF INSURED A COM-
PLETE DEFENSE TO THIS ACTION, NOT-
WITHSTANDING THE INCONTESTABLE
CLAUSE OF THE POLICY.

There is no question in this case as to the fact that the insurer took within a period of one year all of the

steps to renounce liability, rescind the contract and put the parties in statu quo which were possible outside of court. It did everything within its power to contest the policy during the year except to go to court. Furthermore as will be pointed out and developed later, there was from the date of discovery of fraud—after the death of insured and nine months after the policy was issued—to the expiration of the one year period no administrator of deceased. An administrator would have been a necessary party to a court proceeding for cancellation because the administrator was entitled to return of the premium upon court cancellation. Thus a court proceeding by the insurer was impossible during the one year period. This point will be presented later in this brief.

The decisions cited and quoted from under the first heading of this brief establish beyond question that fraud of insured is a defense and “*invalidates the policy*,” to quote again from the Supreme Court of the United States in *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, *supra*. There can be no question but that the provision of the policy that it is incontestable *after* one year, leaves the situation as to the rights of the parties unaffected in every way *during the period of one year*. This point is obvious.

What is the meaning of the term “incontestable after one year” as used in this policy? What was the legislative intent in the requirement of a provision that the policy should be incontestable after a prescribed maximum period? A contest was still allowed within the

prescribed period. What was it intended that the "contest" should include?

The beneficiary contends that the intention was that during the term of one year nothing that either the insurer or the insured could do, outside of court, to rescind the contract should have any effect whatsoever, notwithstanding the most glaring fraud perpetrated by the insured, and this startling conclusion is drawn merely because the policy complying with the statute prescribes that it shall be "incontestable." In other words, that once the policy was issued, the insurer was helpless to rescind or create a defense by any possible action it could take during the one year period reserved for investigation, regardless of the most patent fraud, other than by an expensive court proceeding for cancellation and rescission. The fraud might be discovered within a day after the policy was issued in reliance upon the false and fraudulent representations of insured whose affirmative duty it was to disclose the truth, but nevertheless the insurer must go to the expense of a suit in equity or all else that it may do avails it nothing.

The obvious intention was to make certain to the insured that, after he has paid his second premium, his beneficiary will be cared for, and to impose on the insurer the correlative obligation, after receipt of the second premium, to pay the beneficiary at all events or under all circumstances provided that the insurer has not during the period of one year contested liability, tendered back premiums and demanded return of policy. In other

words the purpose was to assure the insured that after a year has passed without the insurer having done anything to indicate that in the event of the death of the insured it would not pay the face of the policy, provided premiums are regularly paid, he can rest assured that his beneficiary will receive the face of the policy. The insurer has one year in which to make such investigation as it sees fit and rescind the policy if fraud in the application is discovered. But if the insured remains quiescent and does nothing within the one year to intimate or indicate that it will not pay the policy, that is, to contest it, then the insured knows positively that the policy will be paid.

But to contend that it was the intention of the contracting parties or of the legislature that even during the one year period the insurer was helpless to cancel the policy or to create in its favor any defense, other than by going into court in an action to cancel the policy, is to do violence to every reasonable construction of the words of the policy. If the tendering back of the premium which has been paid, the demanding of the return of the policy and the notification that the insurer did not regard itself bound by the policy on account of the fraud practiced by the insured, was not a contest, then what possible term can we apply to the action that was taken by the insurer in this case? Such action must in the nature of things have had some effect and there must be some method of describing the insurer's attitude coupled with its acts. And what word can better describe

what occurred than the term "contest"? We repeat, if the insurer's acts were not a contest then how shall we describe their attitude and action?

The term "contest" is defined in 7 Am. & Eng. Encyclopedia of Law at page 78 as follows:

"CONTEST.—The primary meaning of the verb "to contest" is to make a subject of dispute, contention, or litigation; to call in question, to controvert, to oppose, to dispute. It is further defined as meaning, to defend as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate."

In certain situations, the term "contest" has a definite technical meaning; for example, contest of a will or contest of an election. But those are specialized uses of the terms established through long usage. There is in the law technically no such thing as the contest of an insurance policy. Whenever the insurer tenders back premiums, demands a return of the policy and notifies insured or beneficiary that it no longer considers itself bound by the policy on account of fraud, it makes a form of contest. The bringing of an equity suit for cancellation is merely another form of contest. By the incontestability clause the insurer engages that after a period of one year from the date of the policy has passed without its having denied liability on the policy, tendered back premiums and demanded surrender of the policy, thereafter the assured may rest confident that the insurer will make no defense against a claim under the policy. This clause is a time limitation on the right of the

insurer that would otherwise exist to defend the policy at any time, on account of fraud practiced by the insured. That is to say, the fraud would in all cases and without limitation be a perfect defense but for the said clause. The limitation on the right to defend against fraud should not be so construed as to inflict a greater limitation on the rights of the insurer to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself. And there is nothing whatever in the clause or in the general law to show or even indicate that the term contest as used in the policy means court action.

Our contention as to the intention of the parties is shown further by other words in the incontestable clause. It is provided that the policy is "incontestable after one year except for non-payment of premium." This means, of course, that it is contestable both before and after a year in the event of non-payment of premium. If by the term "contest" is meant court action *alone*, then an insurer has no defense either before or after a year even in the event of non-payment of premiums unless it goes into equity to cancel the policy. Of course that is absurd. But that is the inevitable corollary of the contention that nothing but court action constitutes a contest. After one year it is contestable in one event only—non-payment of premium. Contestable by an equity suit to cancel the policy if the insured does not pay the premium? That must be so if the parties meant by "contest," court action.

The general principles, as shown by scores of cases by

which insurance contracts and clauses therein are to be construed are summarized in *Corpus Juris* under the general title of "Insurance" as follows:

"(Par. 259) 3. *Intention and Ascertainment Thereof*—*a. In General.* A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, as it appears from the language of the whole instrument, viewed in the light of the surrounding circumstances, the object or purpose of the contract, its subject matter, the matters naturally or usually incident thereto, the risk insured against, the situation of the parties, the business in which they are engaged at the time, their relation to each other, and the general undertaking of the company toward its policyholders. The intention of the parties is primarily to be sought in the language of the instrument, and, if possible, it is to be ascertained from the words of the contract alone." 32 *Corpus Juris*, 1148-1150.

"(Par. 261) 4. *Meaning of Languages; Punctuation.* The words employed in a contract of insurance are to be taken and understood in their plain, ordinary, usual, and popular sense, rather than according to the meaning given them by lexicographers or persons skilled in the niceties of language, unless it appears from the four corners of the instrument that both parties intended they should be understood in a different sense, or unless it appears that, by a generally established usage of trade or business in respect to the subject matter, the words have acquired a peculiar sense." 32 *Corpus Juris*, 1150-1151.

"(Par. 262) 5. *Reasonable Interpretation.* Contracts of insurance should be given a fair, reasonable, and sensible construction, such as, it is to be assumed, intelligent business men would give it, rather than a strained, forced, unnatural, unreason-

able, or strict, technical interpretation, or one which would lead to an absurd conclusion, or render the policy nonsensical." 32 Corpus Juris, 1151-1152.

There are many cases involving in one way or another this incontestable clause. But a large number of them are wholly inapplicable to the case at bar for the reason that in them no steps whatever were taken by the insurer to dispute liability or to rescind the policy or to make a contest during the specified period of time—one, two or three years. Such cases have, of course, no bearing on the present issue. And the cases holding that by contest the parties meant court action, are without exception decided without any adequate or satisfactory discussion of the problem involved or explanation of the grounds of the decision. And, finally, so far as appears, there was no statutory requirement that the clause be included in the policy.

Neither the argument on behalf of the beneficiary nor cases cited and relied upon analyze or explain why or by what reasoning the term "contest" means an action in court. Neither the fair inference to be derived from the use of the phrase nor fairness to the insured requires such a conclusion. It is far-fetched indeed to contend that because the phrase is part of the policy, as is compelled by our statute, it is inserted therein for the benefit of the insurer and must therefore be construed against the insurer and most favorably to the insured. If ever a provision of a policy can be for the benefit of the insured and against the interests of the insurer, this provision affords a striking illustration.

If the insurer, *without right*, endeavors to contest the policy by return of premiums, etc., during the first year and during the lifetime of insured, the insured has two choices. He can refuse to consent to such cancellation, continue to make a proper tender of premiums as they fall due, and upon his death, his beneficiary can recover on the policy. *American Trust Co. v. Life Ins. Co.*, 92 S. E. 706. Or he can bring a suit in equity to have the policy declared in force and thereafter there can be no question of recovery upon the policy after his death.

If the insured dies within a year and a contest, *without merit* therein, is made by insurer thereafter, but before the end of one year, the beneficiary can enforce the policy in an ordinary action at law.

There can therefore be no hardship on either insured or beneficiary by the construction which we place upon the phrase. Unless insurer completes its investigation and discovers the fraud and contests the policy during the year by denying liability and tendering back the premiums, the matter is forever at rest and the insured can thereafter rest assured that nothing is required to assure his beneficiary of collection upon the policy upon his death except regular payment of premiums. If the contest by insurer is made without right, the insured if alive can continue to make his tender of premiums, and his beneficiary can recover upon the policy upon the death of insured, or he can have the policy declared valid by a court of equity. It is no more expensive to prosecute such a suit than it is to defend a suit brought to

cancel and rescind the policy. If he dies within the year, the rights of his beneficiary are unaffected by the contest which was made without merit.

On the other hand it is utterly unreasonable to construe the incontestable clause—in all respects so favorable to the insured and beneficiary—as meaning that the parties intended the insurer must go to the expense of a lawsuit to rid itself of liability when a plain and unmistakable fraud by insured was perpetrated upon it.

The one case which reasons this whole matter out on principle is *Mutual Life Ins. Co. of New York vs. Rose, et al.*, 294 Fed. 122, decided in 1923. Large portions of this opinion could be appropriately quoted herein because of the clearness of the reasoning and the unanswerableness of the logic that by the term “contest” is not meant court action alone.

In this case there was a two-year incontestable clause, The insurer discovered that the insured had practiced a fraud upon it as to his health in the application for two life insurance policies and within the contestable period and on the ground of such fraud, tendered to the defendants the premium which had theretofore been paid, demanded the surrender of the policies to it, which they refused, and thereby it was claimed that the policies became and were rescinded.

After the period of contestability had passed, insurer brought a suit in equity to cancel the policies. Defendant moved to dismiss the bill on the principal ground that the insurer had not contested the policy during the con-

testable period. The contention was that nothing but court action could constitute a contest.

The Court discusses and analyses all of the cases on the subject, shows that upon the discovery of the fraud within the contestable period, the insurer may terminate the policy by tender back of the premium, demand of return of policy and notification of rescission; that thereby rescission *in pais* is effected by insurer's acts out of court; that a contest by court proceedings within the contestable period is unnecessary. The Court overruled the motion to dismiss.

We quote the following from the conclusion of this splendidly reasoned out case:

“With this contact with fundamental notions, so finely stated, we are in position to deal with the question in hand from the point of view of principle. That question is whether, if a policy of insurance has been rescinded for fraud in the way thus pointed out, during the period of contestability, may not such rescission be relied on as a ground of a suit in equity to cancel the policy, brought after the expiration of such period, or may it be pleaded as a defense to a suit brought on the policy after the expiration of such a period? It seems to me that it is hardly necessary to do more than state this question than to come to the conclusion that the incontestability clause is not in the way of the bringing of such a suit or the making of such a defense. The question answers itself. There is nothing in such clause that is in the way of a policy in such a case being rescinded; i. e., brought to a termination in such a way. That clause has nothing to do with what may or may not be done during that period. It only deals with what may not be

done after the lapse of that period. Can it be possible that such clause, which does not inhibit such a termination of the policy of insurance during such period, does inhibit its being availed of after the lapse of such period? Such a position, i. e., as to the termination of the policy by rescission, taken in a suit to cancel, or in an answer to an action to recover on the policy—cannot really be said to be a contest as to the policy; i. e., as to its validity. It is merely a claim that it has come to an end and that, even though such claim is based on the voidability of the policy, entitling the insurer to bring it to an end.

“What is sought is not an avoidance of the policy. *It has already been avoided during the contestable period, and what is relied on is that it has already been so avoided.* If, by virtue of any provision in the policy, it should come to an end, even after the lapse of the contestable period, it can hardly be contended that the incontestability clause is in the way of relying on such termination. Or, if it has come to an end during the contestable period, by rescission for fraud, and the insured has accepted the premiums tendered back, it certainly would not be claimed that, after the lapse of such period, suit might not be brought to cancel it, or an action on the policy might not be defended against on this ground. *But such acceptance is not essential to a termination of the policy. It comes to an end by the mere tender of the premiums in the name of rescission and demand of a return of the policy.* What the clause has to do with is the voidability or avoidance of the policy after the expiration of the contestable period. It has nothing to do with whether the policy has come to an end, during such period, even though such termination may be based on the voidability of the policy, and such termination can be relied on aggressively or defensively after the expiration of the period.

"This conclusion is not against, but in line with, the purpose intended to be served by the incontestability clause. It is to prevent the postponement of litigation as to the validity of the policy, not only until after the death of the insured, but until after the lapse of a short period after the execution of the policy. In other words, it is to enable the insured to have a hand in such litigation, and that shortly after such execution. In case the insurer takes steps to rescind the policy on the ground of fraud, such as will bring about its rescission within the contestable period, the insured does not have to wait until the insurer brings suit to cancel the policy based upon such rescission. He can at once take steps to bring the matter to a head by initiating litigation himself. If the insurer is in the wrong—i. e., if the policy was not in fact obtained by fraud—such attempt at rescission is, as said in the American Trust Co. case, 'a breach by renunciation' of the contract of insurance. In such a case the insured does not have to wait until the policy becomes payable by its terms before bringing suit. He can bring suit at once. He has two remedies. They are thus stated in *Day v. Conn. General Life Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 693:

"Thus it would seem that a person situated as the plaintiff was may choose between two remedies: (1) He may elect to consider the policy at an end; in which case, with a declaration containing proper averments, he may recover the equitable and just value of the policy . . . Of course such a case should depend upon the question whether the policy was rightly declared forfeited. If it was, the plaintiff cannot recover; if it was not, he will recover the full value of the policy. (2) If he desires that the policy shall continue, he may institute a proceeding to have it adjudged to be in force, in which case the question of forfeiture may be determined. In that

case the rights of the parties will be determined in a reasonable time, the parties will be relieved of suspense, and if it is decided against the forfeiture both parties will have what they originally contracted for.'

"To the same effect is 14 R. C. L. p. 1014. I must conclude, therefore, that the incontestability clause in the policies involved herein is not in the way of the plaintiff being entitled to the relief he seeks." (Italics ours.) *Mutual Life Ins. Co. of N. Y. v. Rose*, 294 Fed. 122, at pages 133-134."

The leading case, so far as force of authority goes, in support of our contention, is *Mutual Life Ins. Co. of N. Y. v. Hurni Packing Co.* There were three separate appellate court decisions on this case and it is reported in 260 Fed. 641, 280 Fed. 18, and 263 U. S. 167, 68 L. ed. 45, 44 Sup. Ct. Rep. 90.

In the first action, suit was brought by the Packing Company against the insurer on a life insurance policy. Insurer set up fraud as a defense, the fraud consisting in a statement made by the insured, in his application for the life insurance, that he had not consulted nor been treated by a physician during the previous five years, when in fact he had been treated or prescribed for each year for supposedly temporary ailments. A verdict was directed for plaintiff and from the judgment for plaintiff, insurer appealed. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment holding that because of such fraud a verdict should have been directed for defendant insurer. A new trial was ordered. 260 Fed. 641.

Upon the second trial, after the case had been re-docketed, and after a second trial, the plaintiff, by leave of court, amended its reply as follows:

“The plaintiff states that the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premiums paid or otherwise within the two-year period in which the policy might be contested by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer.”

At the close of the evidence, both parties submitted motions for a directed verdict; that of the beneficiary was sustained, a verdict was directed accordingly, and judgment for the beneficiary resulted.

The evidence showed that the policy was dated August 23, 1915. It was executed September 7th and delivered September 13, 1915. The policy on its face contained the permission that “the applicant, upon request, may have policy antedated for a period not to exceed six months.” The policy contained a provision that it should be “incontestable except for non-payment of premiums, provided two years shall have elapsed from its date of issue.”

The insured died on July 4, 1917, less than two years from the time the policy was issued whether the effective date of issue was the date upon the policy as contended by the beneficiaries, or the date of execution and/or delivery as contended by the insurer. Proofs of death were duly submitted. Replying to the claim thereby made, on the 24th day of August, the attorney for the

insurer wrote to the attorney for the beneficiary that the company declined to pay the policy upon the ground of the misrepresentation hereinabove referred to. This was the first action of any nature taken by the company to avail itself of the defense reserved in the two-year clause above quoted.

The court held, first, that the repudiation of the claim of beneficiary such as was made in the letter on behalf of insurer dated August 24th was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for the beneficiary contended. The court then held, in the second place, that although the contest was sufficient, the company did not act in time. That the two-year period began to run from the *date* of the policy—*August 23*—and not from the date of execution or the date of the delivery of the policy as contended by the insurer. That therefore the contest, although sufficient, made on *August 24th*, two years later, was one day too late.

There can be no doubt that the Circuit Court of Appeals decided squarely as the first point of its decision that the contest of the company evidenced by said letter was a sufficient act of contest. This was unmistakably the attitude of the court, as shown by the decision. To quote from page 20 (280 Fed. 20) :

“It is contended by the Insurance Company that the policy must have been in effect two years during the life of the insured; otherwise the right of the insurance company to contest became fixed by death within the period of limitation. We cannot

agree with this view. The reservation for the benefit of the company was one that might be waived. Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy. We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend.

"This being true, there remains only to consider whether the defendant company acted in time. We do not think it did." (Italics ours.)

The insurance company appealed to the Supreme Court of the United States. That court held in affirmance of the Circuit Court of Appeals that although the contest was sufficient it was not made by the insurer in time as the two-year period began to run from the date shown on the face of the policy and not from the date of the execution and/or delivery of the policy.

There can be no doubt that the decision of the Supreme Court, just as the decision of the Circuit Court of Appeals, involves as the very first point of its decision that the contest was sufficient and that a court proceeding to contest the policy is not essential. This is shown, first, by the fact that counsel for insurer made this point as one of the main contentions of insurer. See 263 U. S. 167 at p. 172, under "Argument for Petitioner":

"IV. Notice by the insurance company denying liability on the policy was a 'contest' and prevents the assertion of an estoppel under the incontestability clause."

Moreover, the court says (263 U. S. at page 174): "The first action taken by the insurance company to avail itself of the misrepresentation of the insured was on the 24th day of August, 1917, one day beyond the period of two years after the conventional date of the policy." (Italics ours.)

Although the Supreme Court did not expressly and in so many words, as did the Circuit Court of Appeals, say that the contest was sufficient, it so held as an unmistakable point of its decision. Unless the contest was sufficient, then it was immaterial whether or not it was made in time. It was useless for the Supreme Court of the United States to waste its valuable time deciding whether the two-year period commenced to run from the date of the policy or from the date of the execution and/or delivery unless something occurred during that period to afford insurer a defense—that is, to amount to a "contest" of the policy.

The attitude of the Supreme Court and the effect of its decision as being squarely in point in our favor is well stated by Judge Cochran in *Mutual Life Ins. Co. of N. Y. v. Rose*, 294 Fed. 122 at page 131, wherein it was decided, as shown above, that a court proceeding to contest a policy is unnecessary. Judge Cochran said in commenting upon the second decision of the Hurni case by the Circuit Court of Appeals, *supra* (280 Fed. 18):

"It was taken for granted that such repudiation (letter of August 24th) was a sufficient contest of liability, and that the only question for decision was as to when the two years ran, from the date of the

policy or the date of its delivery. It was held that it ran from the date of the policy, and hence that the repudiation came too late, and the beneficiaries were entitled to recover. . . .

"Then as to the question as to whether the repudiation of liability on the policy was sufficient affirmative action to bring such inchoate right into effect, it was said:

"We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant-in-error contend."

"Here the position just stated was not argued for. It was only argued from. In other words, it was the pre-supposition, the necessary pre-supposition, of the question that was actually considered and decided. Without it there was no such question in the case for consideration and decision. Hence it was that, as I say, though this position was not argued for, it was argued from. *And this, I take it, is sufficient to make the decision a direct authority here in favor of the plaintiff's position.*" (Italics ours.)

It is most earnestly submitted, therefore, that this decision by the Supreme Court of the United States made in 1923 is squarely in point on the issue before this court, and since it is in our favor, other or further citations of cases are unnecessary. We, however, refer the Court to the following recent state court decisions:

Markowitz v. Metropolitan Life Ins. Co., 203 N. Y. Sup. (App. Div.) 534.

Mutual Life Ins. Co. of N. Y. v. Sterens, 195 N. W. (Minn.) 913.

Jefferson Standard Life Ins. Co. v. Smith, 248 S. W. (Ky.) 897.

V. THE NOTICE BY THE INSURER TO CHUN NGIT NGAN OF THE REPUDIATION OF THE POLICY, TENDER TO HER OF THE PREMIUM PAID AND DEMAND FOR RETURN OF THE POLICY WAS A RESCISSION OF SUCH POLICY AND THEREFORE A CONTEST THEREOF.

(A) As beneficiary of the policy Chun Ngit Ngan was the proper person to whom such notice and tender should be made to effectuate a rescission of the policy.

The rule and the reasons therefore are set forth in the *American Century Life Ins. Co. v. Rosenstein*, 92 N. E. 380 at page 383: ~

“The law to which we have referred governing tender and the settled law in this state requiring insurance companies to return or offer to return the fruits of their contracts with the insured, if they would rescind them, being entirely consistent during the life time of the insured are not rendered inharmonious by the substitution of the beneficiary in place of the insured after the latter’s death; for, as we have seen, the law governing this class of contracts creates the necessary privity on the part of the beneficiary, and thereafter the company and the beneficiary are the only parties in interest. The purpose of appellant in offering to return the premium was not that it should be applied upon the contract but to avoid it and if appellee alone could enforce payment of the contract, she alone could have accepted a return of the premium in bar of the action, a thing the personal representative of the insured or the widow could not do. It must be kept in mind that the policy in question was not void, but voidable at the election of the insurer and the rules applicable to a recovery of the premium in the one case are not applicable in the other.”

This decision is followed in *Commercial Life Insurance Co. v. Schoyer*, 95 N. E. 1004, and in *Grand Lodge of B. of R. T. v. Clark*, 127 N. E. 280.

(B) Such notice and tender to Chun Ngit Ngan constituted a rescission as against the estate of the insured.

The evidence herein shows that Yuen Tai Kam, the insured, died intestate, without issue, leaving surviving him his father, Jim Jan, and his widow, Chun Ngit Ngan, plaintiff herein. Under the Hawaiian statute relating to the descent of property the father and widow take as tenants in common. Revised Laws of Hawaii, 1925, Sec. 3305. The policy was issued on May 1, 1922. Insured died on February 5, 1923.

The notice and tender was made to Chun Ngit Ngan on April 7, 1923. The evidence shows, by stipulation upon retrial, that upon such later date there was no executor or administrator of the estate of the deceased; that it was not until May 29, 1923, more than a year after the date of the policy, that an administrator of his estate was appointed. The evidence therefore shows that notice of repudiation and tender of premium was made to one of the two persons who as tenants in common of the estate of decedent were entitled to receive anything to which such estate might be entitled. Chun Ngit Ngan and Jim Jan were the legal representatives of deceased entitled to receive the whole of his estate and the only legal representatives of deceased and of his estate at the time of such notice and tender and indeed until nearly a month after the expiration of the one-year period. It is

clear that to effectuate a rescission and void the contract the defrauded party must make an earnest effort to restore the status quo. But this rule is based upon fairness and justice and *merely requires the innocent party to restore or offer to restore the status quo so far as is reasonably within his power to accomplish it.*

“321. *Rule as to Restoration of Status Quo by Defrauded Party.*—As a general rule, where a party seeks to be relieved from a contract upon the ground that it was induced by fraud, he must, except so far as he has some legal excuse for failure, restore his adversary to the position he was in at the time of the contract, and there can be no rescission as long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party. The reason upon which it rests is the injustice of permitting a man to retain a benefit under a contract which he on his part repudiates.”

6 Ruling Case Law, Page 940.

Roberts v. James, 83 N. J. L. 492, 85 Atl. 244 Ann. Cas. 1914 B. 859.

Bostwick v. Mutual Life Ins. Co., 92 N. W. 246 at page 253.

A bona fide payment to the sole distributee of a fund to which the estate of decedent is entitled, made before administration is granted, operates as a discharge of the party paying from liability to subsequently appointed administrators.

Vail v. Anderson, 64 N. W. 47.

Johnson's Adm'r. v. Long Meyer, 39 Ala. 143.

Hannah's Ex'r. v. Lankford's Adm'r., 43 Ala. 166.

Lewis v. Lyons, 13 Ill. 116.

Walworth v. Abel, 52 Pa. St. 370.

Bogart v. Furman, 10 Paige 496.

Schouler on Wills, Executors and Administrators,
6th Edition, Vol. 4, Sec. 3563.

Likewise a tender to one co-tenant is a tender to both.

Gentry v. Gentry, 33 Tenn. (K. Sneed) 87, 60 Am.
Dec. 137.

Briggs v. Hall, 5 Metc. (Mass.) 504.

Dyckman v. New York, 5 N. Y. 434.

Loddiges v. Lister, 1 L. T. Rep. N. S. 548.

38 Cyc. 157, Note.

It is submitted, therefore, that the admitted notice of repudiation of the contract and tender of the premium to Chun Ngit Ngan effectuated a rescission of the policy and that by such rescission the voidable policy was avoided, wiped out and destroyed so that there is nothing upon which to base an action. Such rescission was accomplished either because as beneficiary she was the proper party to whom notice should be given and tender made or because as tenant in common of estate of deceased she was the proper party, as one of the only two representatives of the estate of deceased, to receive return of the premium. The equitable requirements of restoration of status quo by the insurer to accomplish a rescission has been satisfied so far as was within the power of the insurer to accomplish it. That no executor or administrator of deceased had been appointed at the time of the tender or within a period of a year was attributable to no fault of the insurer.

VI. THE INSURER HEREIN CONTESTED THE POLICY SUED UPON BY JUDICIAL ACTION WITHIN THE PERIOD OF CONTESTABILITY ALLOWED BY THE POLICY.

The policy sued upon in this case is dated May 1, 1922. Insured died February 5, 1923. No administrator was appointed until May 19, 1923. This action was brought upon the policy June 27, 1923. The answer of the defendant was filed upon July 9, 1923, in which answer the insurer gave notice of its intention to rely upon fraud and misrepresentation by the insured in his application for insurance. The filing of this answer constituted a "contest" of the policy within all of the decisions relating to this point. While this answer was not filed within a period of one year from the date of the policy, it was filed within one year excluding the period from February 5, 1923, the date of death of insured, until May 29, 1923, the date of the appointment of an administrator herein.

Such period during which there was no administrator should be exempted from the time limitation of the incontestable clause. It would have been impossible for the insurer to have brought an action for cancellation of the policy during the one year period for the reason that the duly appointed administrator or executor of the estate of decedent would have been a necessary party to such an action. The bill for rescission and cancellation would have been fatally defective if the insured or his duly appointed legal representative had not been

joined with the beneficiary as a party to the proceeding. The court could not and would not decree cancellation unless there was before the court some person standing in place of deceased who was the other party to the contract sought to be cancelled.

Prior to the recent inclusion of the incontestability clause in policies, it was the settled law of the Federal Courts that after the death of insured a suit in equity would not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the courts held that the company had a plain, speedy and adequate remedy by interposing the fraud as a defense to an action at law upon the policy.

Insurance Co. v. Bailey, 13 Wall. 616.

Cable v. U. S. Life Ins. Co., 191 U. S. 288.

Riggs v. Union Life Ins. Co., 129 Fed. 207.

There seems to be only one case in which the question as to whether the period between the death of the insured and the appointment of an administrator should be deducted in computing the period of contestability is decided squarely. The Supreme Court of Illinois, which is the most vigorous of any jurisdiction in the country in strictly construing the contestable clause, held that where an insurance policy was payable to the estate of insured and was incontestable after one year from its issuance, the time between the death of the insured before the expiration of the incontestable period and the appointment of administrator must be deducted in computing

period of contestability, since the insurance company could not move for the appointment of an administrator and could not bring suit to contest the policy until an administrator was appointed. *Ramsay v. Old Colony Life Ins. Co.*, 131 N. E. 108.

The law contemplates that there should be one full year during which the company could bring suit against the insured or his personal representative for rescission or cancellation. In the case at bar the insurer upon a discovery of the fraud after the death of the insured did all that it was legally possible for it to do. It tendered to Chun Ngit Ngan who either as beneficiary under the policy or as one of the two tenants in common entitled to receive the estate of deceased, was entitled to receive the premium. There was in existence no court appointed legal representative of deceased from February 5, 1925, until May 29, 1923. There was no other person to whom a tender could have been made to accomplish a rescission *in pais*.

If there was a rescission of the contract then the contract was thereby destroyed and there was nothing upon which suit could be brought. If there was not a rescission, then it must be because there was no legal representative to whom a tender could be made. If there was no legal representative to whom a tender could be made to effectuate a rescission then there was no person who could have been joined with the beneficiary as a party defendant in an action to cancel the policy. Unless therefore, it be held either that there was a rescission of

the contract because of the tender or that the period during which there was no court appointed legal representative of deceased must be excluded from computation of the period, the insurer herein was absolutely deprived of any possibility of defense during the last three months of the one year period of contestability. It was within the power of the beneficiary to delay the appointment of an administrator until after the one year period had passed and thereby deprive the insurer of its perfect defense on the ground of fraud.

It is submitted that the decision in the Ramsay case from the Supreme Court of Illinois quoted above is precisely in point to the effect that this period should be excluded in computation of the one year period. If such period be excluded the insurer herein made a judicial contest by the filing of its answer setting up the fraud within a period of one year.

The plaintiff-in-error cites *N. W. Mutual Life Ins. Co. v. Pickering*, 293 Fed. 496, as being opposed to our contention on this point. Examination of the case, however, shows that it is not even in its dicta in opposition to our contention. There the insured died within three months after a reinstatement of the policy. There was no administrator between the third and fifth months. But during the last seven months of the one year period there was an administrator who could have been sued and during all that time the insurer was aware of the fraud. The court said on page 498:

“The part of the plea which was stricken does not disclose the case of an insured being deprived by the action or nonaction of beneficiaries under the policy of a reasonable opportunity to contest within a year from the date of the reinstatement. On the contrary, it is disclosed that during the period of more than seven months prior to the expiration of one year from the date of the reinstatement there was no obstacle to prevent the institution of a contest, and that the ground for contest relied on was discovered during that period. That being so, the lack of administration on the insured’s estate for a short time prior to the insurer’s discovery of a ground of contest was without influence on the conduct of the insurer, and cannot excuse the insurer’s failure to contest within the time allowed.

“A different question would have been presented if those who would have been benefited by the payment of the insurance money had been responsible for a postponement of the appointment of a personal representative of the deceased insured until shortly before or after the expiration of a year from the date of the reinstatement of the policy, with the result of depriving the insurer of a reasonable opportunity for contesting within the time allowed.”

VII. GREAT WEIGHT SHOULD BE GIVEN TO THE DECISION OF THE SUPREME COURT OF HAWAII.

The question herein involves an interpretation of the meaning of a phrase required by a Hawaiian statute enacted before any judicial construction had been placed upon the phrase. The Hawaiian Supreme Court has in the decision herein interpreted that phrase to mean that the acts of the insurer constituted a contest. We have

here a clear instance of a local territorial statute. It is well settled that under such circumstances an appellate court must lean toward the interpretation adopted by the Supreme Court of the Territory, and will not disturb its decision unless there is clear error.

Cardona v. Quinones, 240 U. S. 83, 36 Sup. Ct. 346, 60 L. Ed. 538;

Lewers & Cooke v. Atcherly, 222 U. S. 285, 34 Sup. Ct. 94, 56 L. Ed. 202;

Kaaloha v. Castle, 210 U. S. 149, 28 Sup. Ct. 684, 52 L. Ed. 998;

Ewa Plantation Co. v. Wilder, 289 Fed. 664;

Kinney v. Oahu Sugar Co., 255 Fed. 732, 167 C. C. A. 78;

Castle v. Castle (C. C. A.), 281 Fed. 609;

Territory of Hawaii v. Hutchinson Sugar P. Co. (C. C. A.), 272 Fed. 856;

In Re Bishop's Estate, 250 Fed. 154, 162 C. C. A. 281.

CONCLUSION

In conclusion it is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed. The insured was guilty, admittedly, of the most glaring fraud which invalidated the policy.

The Hawaiian statute of 1917 required the incontestable clause involved herein and hence no presumption against the insurer is warranted in the interpretation of the meaning of the clause.

The steps taken by the insurer within the contestable period constituted a contest within the meaning of the Hawaiian statute and of the parties.

The steps taken by the insurer within the contestable period, in view of the fact that the beneficiary was a tenant in common with the father in the estate of the intestate insured, constituted a rescission of the policy and therefore a contest thereof.

The filing by the insurer of his answer in this action within a period of one year from the date of the policy, deducting the period when there was no administrator of deceased insured, was unmistakably a contest of the policy and as such a complete defense of this action.

The question presented upon this writ of error is a purely local one involving merely the interpretation of a Hawaiian statute. All of the cases relied upon by the plaintiff-in-error were decided subsequent to 1917, the date of the enactment of the Hawaiian statute requiring this contestable clause, and hence throw no light upon the legislative intent in the requirement of this provision. Great weight should be given to the decision of the Supreme Court of Hawaii primarily charged with the interpretation of a Hawaiian statute,

Respectfully submitted,

FREAR, PROSSER, ANDERSON & MARX.

Walter F. Frear

Mason F. Prosser

Robbins B. Anderson

Dated at Honolulu, T. H., October 27, 1925.

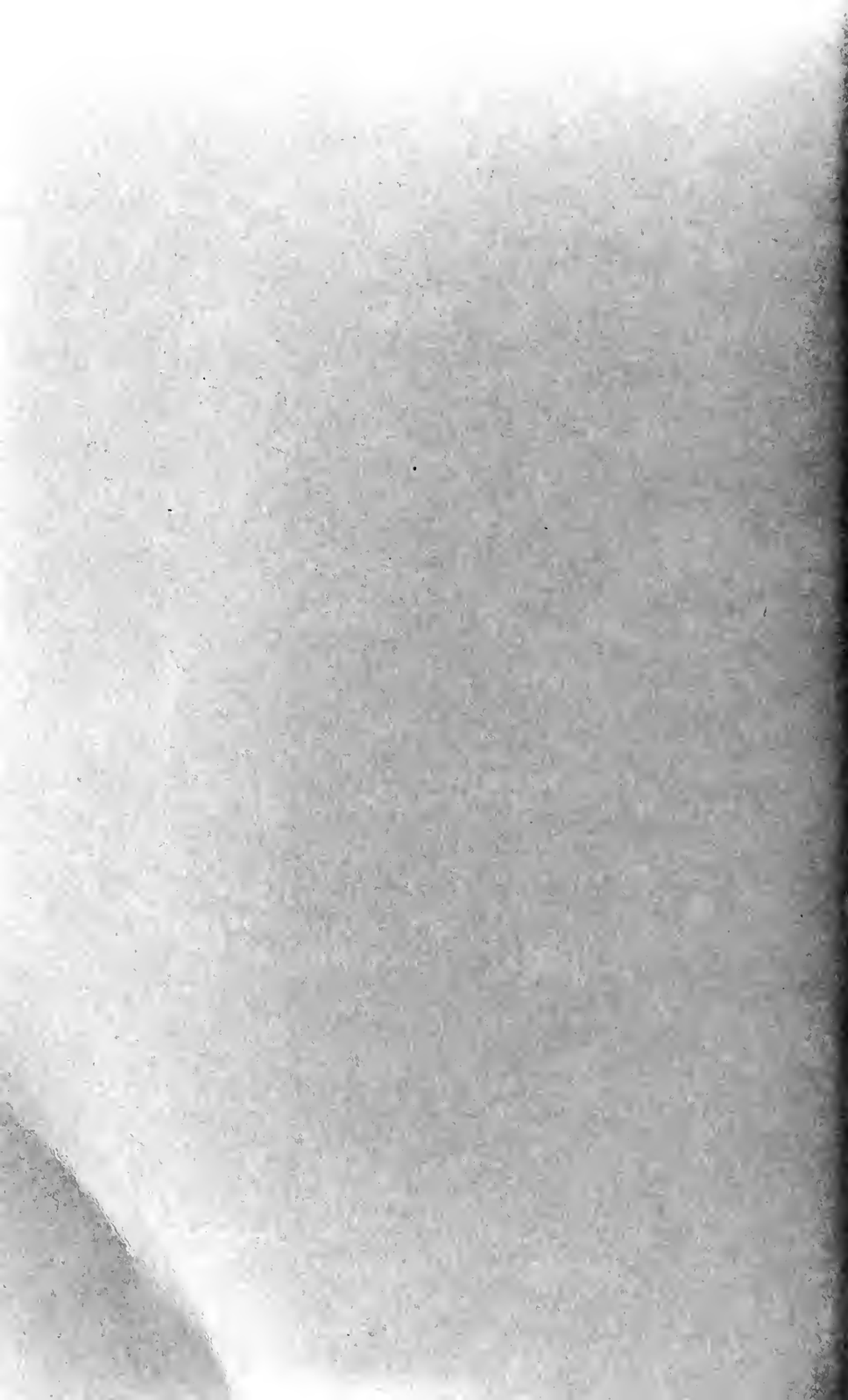
No. 4661

United States
Circuit Court of Appeals
For the Ninth Circuit.

GUY ROCKWELL and ERCOLE MAGLIONI,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.



No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,	:	
	Plaintiff,	) No. 5739-B Crim.,
	:	
-vs-	)	CITATION ON
	:	WRIT OF
GUY ROCKWELL & ERCOLE	)	ERROR
MAGLIONI,	:	
	Defendants,)

* * * * *

UNITED STATES OF AMERICA * * * * SS
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.
TO THE UNITED STATES OF AMERICA,
GREETINGS:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the city of San Francisco, in the state of California, within thirty days from date hereof, pursuant to a writ of error on file in the Clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, in that certain cause numbered 5739-B Crim., in said District Court, wherein Guy Rockwell and Ercole Maglioni are plaintiffs in error, and you are defendant in error, to show cause,

if any there *by*, why the judgment given, made and entered against the said Guy Rockwell and Ercole Maglioni, plaintiffs in error, in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm P James United States District Judge for the Southern District of California, this Eleventh day of May,, 1925, in the year of our Lord, and of the Independence of the United States, the one hundred and forty ninth.

Wm P James

United States District Judge
for the Southern District of Calif.

[Endorsed]: Original. No. 5739-B Criminal IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, UNITED STATES OF AMERICA, Plaintiff, -vs- GUY ROCKWELL & ERCOLE MAGLIONI, Defendants CITATION ON WRIT OF ERROR Received copy of the within Citation May 11 1925 Donald Armstrong Asst. United States Atty. FILED MAY 11 1925 CHAS. N. WILLIAMS, Clerk G F Gibson Deputy O. V. Wilson Washington Bldg Atty for Deft Guy Rockwell & Ira L. Brunk 321 W 3rd St, Atty for Ercole Maglioni

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,	)	: No. 5739-B Crim.,
)	
Plaintiff,)	
)	
-vs-	)	: WRIT OF
	)	: ERROR
GUY L. ROCKWELL, &)	
ERCOLE MAGLIONI,)	
Defendants,)	

* * * * *

UNITED STATES OF AMERICA, -ss

The President of the United States of America to
the Honorable Judge of the District Court of the
United States, in and for the Southern District of
California, Southern Division GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you between Guy L.
Rockwell and Ercole Maglioni, plaintiffs in error, and
the United States of America, defendants in error, a
manifest error hath happened to the great damage of
said Guy L. Rockwell and Ercole Maglioni, plaintiffs
in error, as by their complaint appears:

We being willing that error, if any hath happened,
should be duly corrected and full and speedy justice
be done to the parties aforesaid, in this behalf do com-
mand you, if judgment be therein given, that *the*,
under your seal, distinctly and openly, you send the

record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the state of California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to laws and customs of the United States should be done.

WITNESS the Honorable Wm Howard Taft Chief Justice of the United States, this Eleventh day of May in the year of our Lord, One thousand, nine hundred and twenty five and the year of our Independence the one hundred and Forty ninth

Chas N Williams

Clerk of the District Court of the United
[Seal] States for the Southern District of
California.

R S Zimmerman

Deputy

Writ allowed May 11, 1925

Wm P James

Judge

I HEREBY CERTIFY that a copy of the within Writ of Error was on the 11th day of May 1925 lodged in the office of the clerk of the said United States District Court, for the Southern District of

California, Southern Division, for said Defendants in Error.

(Seal)

CHAS. N. WILLIAMS

Clerk of the District Court of the United
States for the Southern District of
California,

BY: G. F. Gibson

Deputy Clerk.

[Endorsed]: Original—No. 5739-B. Criminal IN
THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALIFOR-
NIA SOUTHERN DIVISION UNITED STATES
OF AMERICA, Plaintiff, -vs- GUY ROCKWELL
& ERCOLE MAGLIONI, Defendants, WRIT OF
ERROR FILED MAY 11 1925 CHAS. N. WIL-
LIAMS, Clerk G F Gibson Deputy O. V. Wilson,
Washington Bldg. Atty for Defendant Gy Rockwell.
& Ira L. Brunk, 321 W. 3rd St. atty for Ercole
Maglioni

No.....

Filed.....

Viol: Opium Act of Feb. 9, 1909 as amended May 26,
1922 and Sec. 37 of Federal Penal Code—Con-
spiracy to violate Harrison Narcotic Act of Dec.
17, 1914 as amended Feb. 24, 1919, and Opium
Act of Feb. 9, 1909 as amended May 26, 1922;

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

At a stated term of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday in January, in the year of our Lord one thousand nine hundred and twenty-three:

The Grand Jurors of the United States of America chosen, selected and sworn, within and for the Division and District aforesaid, on their oaths present:

That GUY ROCKWELL and ERCOLE MAGLIONE, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 27th day of February, A. D. 1923, at Los Angeles, Los Angeles County, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously receive a certain narcotic drug, to-wit: three (3) ounces of cocaine, which was then and there subject to importation duty by law and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain

person or persons whose names are to the Grand Jurors unknown, into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then *a* and there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid thereon and without any arrangement having been made for the payment of said duty, and without the said cocaine having been invoiced and declared, contrary to law; and the said cocaine was then and there a salt, derivative and preparation of coca leaves; in violation of the Act of February 9, 1909 as amended May 26, 1922, known as the Opium Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That GUY ROCKWELL and ERCOLE MAGLIONE, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 27th day of February,

A. D. 1923, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously conceal a certain narcotic drug, to-wit: about three (3) ounces of cocaine, which was then and there subject to importation duty by law and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain person or persons whose names are to the Grand Jurors unknown, into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then and there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid thereon and without any arrangement having been made for the payment of said duty, and without the said cocaine having been invoiced and declared, contrary to law; and the said cocaine was then and there a salt, derivative and preparation of coca leaves; in violation of the Act of February 9, 1909 as amended May 26, 1922, known as the Opium Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That GUY ROCKWELL and ERCOLE MAGLI-ONE, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 27th day of February, A. D. 1923, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously facilitate the transportation of a certain narcotic drug, to-wit: about three (3) ounces of cocaine, which was then and there subject to importation duty by law and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain person or persons whose names are to the Grand Jurors unknown, into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then and there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid

thereon and without any arrangement having been made for the payment of said duty, and without the said cocaine having been invoiced and declared, contrary to law; and the said cocaine was then and there a salt, derivative and preparation of coca leaves; in violation of the Act of February 9, 1909 as amended May 26, 1922, known as the Opium Act;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That GUY ROCKWELL and ERCOLE MAGLIONE, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the the 25th day of February, A. D. 1923, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully, corruptly, fraudulently and feloniously conspire, combine, confederate and agree together and with various and sundry other persons to the Grand Jurors unknown, to commit certain offenses against the United States, to-wit:

1. The offense of knowingly, willfully, unlawfully and feloniously dealing in and distributing certain nar-

cotics, to-wit: about three (3) ounces of cocaine without having registered and paid the special tax as required and imposed by Section One of an Act of Congress approved February 24, 1919, amending an Act of Congress approved December 17, 1914 and known as the Harrison Narcotic Act; the said defendants being then and there persons required to register and pay the special tax under and by the above said Act and Section One thereof, and the said defendants then and there having in their possession and under their control as such dealers, with intent to deal in and distribute the said narcotic drug not then and there contained in the original stamped package having affixed thereto and bearing thereon appropriate tax stamps as required by the said Harrison Narcotic Act, the said cocaine being then and there a compound, salt, derivative and preparation of coca leaves;

2. The offense of knowingly, willfully, unlawfully and feloniously receiving a certain narcotic drug, to-wit: three (3) ounces of cocaine, which was then and there subject to importation duty by law and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain persons whose names are to the Grand Jurors unknown into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then and

there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid thereon and without any arrangement having been made for the payment of said duty, and without the said cocaine having been invoiced and declared, contrary to law; the said cocaine being then and there a salt, derivative and preparation of coca leaves; in violation of the Opium Act of February 9, 1909 as amended May 26, 1922;

3. The offense of knowingly, willfully, unlawfully and feloniously concealing a certain narcotic drug, to-wit: about three (3) ounces of cocaine, which was then and there subject to importation duty by law and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain persons to the Grand Jurors unknown, into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then and there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid thereon and without any arrangement having been made for the payment of said duty and without the said cocaine having been invoiced and declared, contrary to law; the said cocaine being then and there a

salt, derivative and preparation of coca leaves; in violation of the Opium Act of February 9, 1909 as amended May 26, 1922;

4. The offense of knowingly, willfully, unlawfully and feloniously facilitating the transportation of a certain narcotic drug, to-wit: about three (3) ounces of cocaine, which was then and there subject to importation duty by law, and which, on importation, should have been invoiced and declared, and which cocaine had theretofore been clandestinely brought, smuggled and imported by certain persons whose names are to the Grand Jurors unknown, into the United States from a foreign country, the name of said foreign country and the place of importation being to the Grand Jurors unknown, without the payment or arrangement for the payment of said duty thereon and without the said cocaine having been invoiced and declared, the said defendants then and there well knowing that the said cocaine had been so clandestinely brought, smuggled and imported into the United States without the duty having been paid thereon and without any arrangement having been made for the payment of said duty, and without the said cocaine having been invoiced and declared, contrary to law, and the said cocaine was then and there a salt, derivative and preparation of coca leaves; in violation of the Opium Act of February 9, 1909 as amended May 26, 1922;

All of which said offenses are more particularly defined by Sections One and Eight of the Harrison Nar-

cotic Act as aforesaid and the Opium Act as aforesaid;

And all of which said cocaine was then and there a compound, manufacture, salt, derivative and preparation of coca leaves;

The said conspiracy, combination, confederation and agreement was continuously, throughout all of the times mentioned in this Indictment, in operation and existence;

OVERT ACT NO. I.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 25th day of February, A. D. 1923, at Los Angeles, Los Angeles County, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, the defendant GUY ROCKWELL went to the home of one Emil Linnert;

OVERT ACT NO. II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 25th day of February, A. D. 1923, at Los Angeles, Los Angeles County, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, the defendant GUY ROCKWELL went to the home of one Clyde Ewing;

OVERT ACT NO. III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 27th day of February, A. D. 1923, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, the said defendants, GUY ROCKWELL and ERCOLE MAGLIONE met the said Clyde Ewing at the Lasky Studios;

OVERT ACT NO. IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 27th day of February, A. D. 1923, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, the defendants, GUY ROCKWELL and ERCOLE MAGLIONE gave to the said Clyde Ewing a small quantity of cocaine;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOSEPH C. BURKE

United States Attorney

Mark L. Herron

Assistant United States Attorney

[Endorsed]: No. 5739B UNITED STATES DISTRICT COURT, Southern District of California Southern Division. THE UNITED STATES OF AMERICA vs. GUY ROCKWELL and ERCOLE MAGLIONE INDICTMENT Viol: Opium Act of Feb. 9, 1909 as amended May 26, 1922 and Sec. 37 Fed. Penal Code—Conspiracy to violate Harrison Narcotic Act of 12/17/14 as amended 2/24/19 and Opium Act of 2/9/09 as amended 5/26/22 A true bill, Dean Mason, Foreman. FILED Jun 8—1923 CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy Clerk. Bail, \$5000—

At a stated term, to wit: The July Term, A. D. 1923 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Saturday the 20th day of October, in the year of Our Lord one thousand nine hundred and twenty-three.

Present:

The Honorable WM. P. JAMES District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B Crim.
vs.	
Guy Rockwell and Ercole Maglione,	
Defendants.	

This cause coming on at this time for arraignment and plea of defendant Guy L. Rockwell; Russell Graham, Esq., Assistant United States Attorney, appearing as counsel for the Government, defendant Guy L. Rockwell being present in court and having been called, said defendant waives the reading of the In-

dictment and states his name to be as given therein; and, upon being required to plead, defendant Guy L. Rockwell interposes his plea of not guilty to each of the four counts of the Indictment; now, good cause appearing therefor, it is by the court ordered that this cause be continued to the December Calendar for setting for trial on each of the four counts as to defendant Guy L. Rockwell.

At a stated term, to wit: The July Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 22nd day of October, in the year of Our Lord one thousand nine hundred and twenty-three.

Present:

The Honorable WM. P. JAMES District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B
vs.	
Guy L. Rockwell and Ercole Maglione,	
Defendants.	

This cause coming on at this time for arraignment and plea of defendant Ercole Maglione; Russell Graham, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant Ercole Maglione being present in court on bail with Thomas Connell, Esq., who appears on behalf of Stanley Visel, Esq. and said defendant having been called waives the reading of the Indictment and states his name to be as given therein, and, upon being required to plead,

interposes his plea of not guilty; now, good cause appearing therefor, it is by the court ordered that this cause be continued to the December Calendar for setting for trial of defendant Ercole Maglione.

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 21st day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B	
vs.		} Crim.
Guy Rockwell and Ercole Maglione, Defendants.		

This cause coming before the court for trial of defendants herein; J. Edwin Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Guy Rockwell and Ercole Maglione being present in court on bail and Chas. Barnhart, Esq. appearing for defendant Ercole Maglione; L. Vaillancourt being also present in court in his official capacity as stenographic reporter of the testimony and proceedings, it is by the court ordered that a jury be impanelled herein, and thereupon the following twelve names are drawn from the jury box:

Neal Nettleship; Fred J. Blumle, Jr.; Geo. Guppy, R. W. Carter, A. H. Voight; Franklin Otis Booth;

M. A. Bresee; Chas. S. Gilbert; Edward I. Moore; Fred'k. O'Brien; Louis J. Harris and Walter R. Simons, and said petit jurors having been called and examined by the court and by J. E. Simpson, Esq. and Chas. Barnhart, Esq. in behalf of the Government, and defendants, respectively, for cause, and passed for cause, and counsel for the respective parties not having desired to peremptorily challenge the petit jurors now in the box, it is by the court ordered that said petit jurors be sworn in a body as the jury to try this cause, said jurors as sworn, consisting of the following persons, to wit:

THE JURY:

Neal Nettleship,	M. A. Bresee,
Fred J. Blumle, Jr.,	Chas. S. Gilbert,
Geo. Guppy,	Edward I. Moore,
R. W. Carter,	Fred'k O'Brien,
A. H. Voight,	Louis J. Harris,
Franklin Otis Booth,	Walter R. Simons,

At the hour of 10:45 o'clock A. M. the court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instruction of the court they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and declares a recess for five minutes; and at the hour of 10:50 o'clock A. M. the

court having reconvened and all being present as before,

J. Edwin Simpson, Esq. makes a statement of the Government's case, and witnesses having been called and excluded from the court room; and Arthur L. Veith, Esq. counsel for defendant Guy Rockwell being present,

Irwin S. Liner is called and sworn and testifies in behalf of the Government and is cross examined by Attorney Chas. Barnhart, Esq., and said witness having been examined by the court,

Clyde T. Ewing is called and sworn and testifies in behalf of the Government, and

In connection with his testimony there having been offered and marked for Identification in behalf of the Government the following exhibit, to wit:

Plaintiff's Ex. No. 1 for Identification: one bindle of cocaine;

At the hour of twelve o'clock noon the court gives to the jury herein the aforementioned admonition and declares a recess to the hour of two o'clock P. M. and at the hour of two o'clock P. M. the court having reconvened and all being present as before,

Witness Clyde T. Ewing resumes the stand, and in connection with his testimony there having been offered and marked for Identification in behalf of the Government the following exhibits to wit:

Plaintiff's Ex. No. 2 for Identification: one bottle cocaine—contents partly missing;

“ “ “ 3 for Identification: one bottle cocaine marked “1”;

“ “ “ 4 for Identification: one bottle cocaine marked “2”;

Said witness Clyde T. Ewing is cross examined by Attorney Chas. Barnhart, Esq., counsel for defendant Ercole Maglione, and said witness having been subjected to re-direct examination by J. Edwin Simpson, Esq. counsel for the Government,

Leo Green is called and sworn and testifies in behalf of the Government, and said Leo Green having been cross examined by Attorney Arthur L. Veitch, Esq.;

At the hour of 3:30 o'clock P. M. the court gives to the jury herein the aforementioned admonition and declares a recess for five minutes, and at the hour of 3:35 o'clock P. M. the court having reconvened and all being present as before,

Chandler Sprague is called and sworn and testifies in behalf of the Government, and in connection with his testimony exhibits Nos. 2, 3 and 4 heretofore offered and marked for Identification having been admitted in evidence,

Said Chandler Sprague is cross examined by Attorney Arthur L. Veitch, Esq. and said witness having thereupon been examined by the court,

At the hour of 4:30 P. M. the court again admonishes the jury and declares a recess to the hour of ten o'clock A. M. January 22nd, 1925.

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the

Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday the 22nd day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B Crim.
vs.	
Guy Rockwell and Ercole Maglione, Defendants.	

This cause coming before the court for further trial of defendants herein; J. Edwin Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant Guy Rockwell being present in court on bail with his attorney Arthur L. Veitch, Esq. and defendant Ercole Maglione being present in court with his attorney Chas. Barnhart, Esq., on bail; it is by the court ordered that the jury in this cause be temporarily withdrawn from the box pending impanellment of a jury in the case of Mike Jim No. 6683 Crim. and the jury in case No. 6683 Crim. having been impanelled, and the jury in this cause, to-wit: 5739-B, Crim., having returned to the box at the hour of 10:30 o'clock A. M., and all being present as before,

Albert F. Nathan is called and sworn and testifies in behalf of the Government, and said witness having been cross examined by Arthur L. Veitch, Esq. counsel for defendant Guy Rockwell,

The court admonishes the jury herein at the hour of 11:25 o'clock A. M. and declares a recess for five minutes, and at the hour of 11:30 o'clock A. M. the jury having returned and the court having reconvened, and all being present as before,

Harvey W. Bell is called and sworn and testifies in behalf of the Government, and is cross examined by Chas. Barnhart, Esq. counsel for the defendant Ercole Maglione, and said witness having been subjected to re-direct examination by J. Edwin Simpson, Esq. counsel for the Government.

At the hour of 12:10 o'clock P. M. the court admonishes the jury and declares a recess to 1:30 o'clock P. M. and at the hour of 1:30 o'clock P. M. the court having reconvened and all being present as before, and one of the jurors, Walter R. Simons, having informed the court of his illness, it is by the court ordered that an adjournment take place until the hour of ten o'clock A. M. January 23rd, 1925.

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 23rd day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B	
vs.		
Guy Rockwell and Ercole Maglione,		} Crim.
Defendants.		

This cause coming on at the hour of ten o'clock A. M. for further trial before this court and a jury heretofore impanelled herein; J. E. Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant Guy Rockwell being present in court with attorney Arthur L. Veitch, Esq. and defendant Ercole Maglione being present in court with attorney Chas. Barnhart, Esq.; L. Vailancourt being also present in court in his official capacity as stenographic reporter of the testimony of the proceedings, and the jury all being present,

Harvey W. Bell resumes the witness stand and having been further cross examined by Chas. Barnhart, Esq. in behalf of the defendant Ercole Maglione,

Wm. R. Wood is called and sworn and testifies in behalf of the Government, and in connection with his testimony there having been offered and admitted in evidence in behalf of the Government the following exhibit, to wit:

Plaintiff's Ex. No. 1—One bindle cocaine heretofore marked for identification;

V. H. DeSpain is called and sworn and testifies in behalf of the Government, and said witness having been examined by the court,

F. H. Stribbling is called and sworn and testifies in behalf of the Government and

Cecil G. Bills having been called and sworn and having testified in behalf of the Government, and having been cross examined by Arthur L. Veitch, Esq.,

C. E. Peoples is called and sworn and testifies in behalf of the Government, and said witness having been cross examined by Arthur L. Veitch, Esq.,

At the hour of 11:05 A. M. the court gives to the jury herein the admonition, as heretofore, and declares a recess for five minutes, and at the hour of 11:10 o'clock A. M. the jury having returned into court and the court having reconvened and the court having ordered that this trial be proceeded with,

C. E. Peoples resumes the witness stand and is further cross examined by Attorney Arthur L. Veitch, Esq. and is thereupon examined by the court; and

The Government having rested,

Byron C. Hanna is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq.,

Asa Keyes is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq. in behalf of the Government,

W. J. Ford is called and sworn and testifies in behalf of the defendants; and

Guy L. Rockwell having been called and sworn and having testified in his own behalf,

At the hour of twelve o'clock noon the court admonishes the jury and declares a recess to the hour of 1:30 o'clock P. M. and at the hour of 1:30 o'clock P. M. the jury having returned to the court room and

the court having reconvened and all being present as before,

John W. Summerfield is called and sworn and testifies in behalf of the defendants; and

Albert Lee Stephens having been called and sworn and having testified in behalf of the defendants,

Defendant Guy L. Rockwell resumes the witness stand, and said witness having testified in his own behalf,

At the hour of 2:05 o'clock P. M. the court admonishes the jury in this cause and declares a recess until the Grand Jury has reported, and at the hour of 2:30 o'clock P. M. the court having reconvened in this cause and the jury being present,

Defendant Guy L. Rockwell resumes the witness stand and testifies further in his own behalf, and said defendant having been cross examined by J. Edwin Simpson, Esq., in behalf of the Government, and examined by the court,

At the hour of five o'clock P. M. the court gives to the jury the aforementioned admonition and declares a recess to the hour of ten o'clock A. M. January 27th, 1925.

At a stated term, to wit: The January Term, A. D. 1925, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 27th day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B. Crim.
vs.	
Guy Rockwell and Ercole Maglione, Defendants.	

This cause coming before the court for further trial; J. Edwin Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; Defendant Guy Rockwell being present in court with his attorney Arthur L. Veitch, Esq and defendant Ercole Maglione being present in court with attorney Chas. Barnhart, Esq.; L. Vaillancourt being also present in court in his official capacity as stenographic reporter of the testimony and proceedings, and the jury being present, and the court having ordered that this trial be proceeded with,

Defendant Guy Rockwell is recalled to the witness stand and is examined by the court and by juror Nettleship, and having been examined by his attorney Arthur L. Veitch, Esq.,

Herman O. Miller is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq. counsel for the Government,

Ercole Maglione is called and sworn and testifies in behalf of the defendants, and

At the hour of 11:30 o'clock A. M. the court having declared a recess for five minutes and at the hour of 11:35 o'clock A. M. the court having reconvened and all being present as before, and the jury being present,

Defendant Ercole Maglione resumes the witness stand and testifies in behalf of the defendants; and

At the hour of twelve o'clock noon the court having admonished the jury and declared a recess to 1:30 o'clock P. M. and at the hour of 1:30 o'clock P. M. the court having reconvened and all being present as before and the jury being present,

Defendant Ercole Maglione resumes the witness stand and testifies in behalf of the defendants and is cross examined by J. Edwin Simpson, Esq. counsel for the Government, and said defendant having been examined by the jurors,

H. H. Dolley is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq. in behalf of the Government,

At the hour of 2:35 o'clock P. M. the court admonishes the jury and declares a recess for five minutes, and at the hour of 2:40 o'clock P. M. the court having reconvened and all being present as before, and the jury being present,

Guy Rockwell is recalled and said Guy Rockwell having been examined by juror Booth,

Geo. Hewston is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq., counsel for the Government,

Alfred K. Hewston is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq. counsel as aforesaid,

Walter Keating is called and sworn and testifies in behalf of the defendants, and said witness having been cross examined by J. Edwin Simpson, Esq.,

Frank W. Modie is called and sworn and testifies in behalf of the defendants, and at the hour of 3:25 o'clock P. M. the defendants having rested,

Defendant Guy Rockwell is recalled and is examined by Juror Guppy, and

Defendant Ercole Maglione having been recalled and examined by Juror Guppy,

At the hour of 3:37 o'clock P. M. the court admonishes the jury and declares a recess for fifteen minutes, and at the hour of 3:52 o'clock P. M. the court having reconvened and all being present as before, and the jury being present, on motion of Chas. Barnhart, Esq.,

It is by the court ordered that defendants be allowed to re-open the case; and

Edmund L. Smith, Deputy Clerk, having been called, sworn by the court and having testified and verified the record of this court,

Irwin S. Liner is recalled in rebuttal and testifies further for the Government, and said witness having been cross examined by Arthur L. Veitch, Esq. counsel for defendant Guy Rockwell,

Fred Harris is called and sworn and testifies in behalf of the Government, and in connection with his testimony there are offered and admitted in evidence in behalf of the Government the following exhibits, to wit:

Plaintiff's Ex. No. 5: Date Book of Lasky's Studio for
December, 1922,

“ “ “ 6: Date Book of Lasky's Studio for
January, 1923,

and,

Said witness Fred Harris having been cross examined by Attorney Arthur L. Veitch, Esq., counsel for defendant Guy Rockwell,

At the hour of 4:35 o'clock P. M. the court admonishes the jury as heretofore and declares a recess in this cause to the hour of ten o'clock A. M. January 28th, 1925.

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 28th day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B. Crim.
vs.	
Guy Rockwell and Ercole Maglione, Defendants.	

This cause coming before the court for further trial; J. Edwin Simpson, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Guy Rockwell and Ercole Maglione being

present in court, Chas. Barnhart, Esq. appearing for defendant Ercole Maglione, and L. Vaillancourt being also present in court in his official capacity as stenographic reporter of the testimony and proceedings, and the jury being present,

Herman O. Miller is recalled to the witness stand at the request of the court and is cross examined by J. Edwin Simpson, Esq. counsel for the Government, and said witness having been examined by the court,

Irwin S. Liner is recalled at the request of the court and is examined by J. E. Simpson, Esq., and the court, and said Irwin S. Liner having been cross examined by Chas. Barnhart, Esq. counsel as aforesaid,

At the hour of 10:30 o'clock A. M. J. Edwin Simpson, Esq. argues to the jury in behalf of the Government; and

At the hour of 11:10 o'clock A. M. the court having admonished the jury herein as heretofore and declares a recess for five minutes, and at the hour of 11:15 o'clock A. M. the court having reconvened and all being present as before and the jury being present,

At the hour of 11:20 o'clock A. M. Chas. Barnhart, Esq. argues for the defendants, and at the hour of 11:50 o'clock A. M. Attorney Arthur L. Veitch, Esq. having argued for the defendants, at the hour of 12:45 o'clock P. M. the court admonishes the jury as heretofore and declares a recess to the hour of 1:45 o'clock P. M. and at the hour of 1:45 o'clock P. M. the court having reconvened and all being present as before, the court instructs the jury herein with respect to the law

involved herein, and Attorney Arthur L. Veitch, Esq. having excepted to said charge,

At the hour of 2:50 o'clock P. M. the jury retire in custody of Bailiff Felix Clavere to deliberate upon their verdict; and

At the hour of 4:30 o'clock P. M. the jury having returned into court and asked if they have agreed upon a verdict, reply that they have so agreed, and, upon being required to present the same, the following verdict is presented and read by the clerk of the court:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. United States of America, Plaintiff, vs. Guy Rockwell and Ercole Maglione, defendants. Verdict No. 5739 B. Cr. We, the jury in the above entitled case, find the defendant, Guy Rockwell, guilty as charged in the 1st count of the Indictment and guilty as charged in the 2nd count of the Indictment, and guilty as charged in the 3rd count of the Indictment and guilty as charged in the 4th count of the Indictment; and the defendant Ercole Maglione guilty as charged in the 1st count of the Indictment, and guilty as charged in the 2nd count of the Indictment, and guilty as charged in the 3rd count of the Indictment and guilty as charged in the 4th count of the Indictment. Los Angeles, California, January 28, 1925. Walter R. Simons, Foreman.
and

The verdict of each defendant herein of guilty on each of the four counts of the Indictment having been

presented and read by the clerk of the court, as aforesaid, and filed herein, it is by the court ordered that this cause be continued to the hour of ten o'clock A. M. February 2nd, 1925, for sentence of defendants Guy Rockwell and Ercole Maglione, and defendants having been ordered remanded into the custody of the United States Marshal, it is by the court ordered that the narcotics seized herein be returned to the Narcotic Agents for safe-keeping.

No.

The defendant in this case is presumed by law to be innocent of any crime until his guilt of such crime is established beyond all reasonable doubt.

And if you are not satisfied beyond a reasonable doubt of every essential and material element necessary to make up the crime, you must acquit him.

It is incumbent upon the prosecution to prove every material element of the *defense* beyond a reasonable doubt, and if you have such reasonable doubt as to whether they have proved or have failed to prove any one essential and material fact going to make up his guilt, it is your sworn duty to acquit the defendant.

It is by law considered better that any numbers of guilty persons should escape than to adopt a course under which an innocent man might be convicted, because of an erroneous conclusion of a court or jury.

Requested by the defendant and allowed.

Judge.

No.

It is your duty under the law if you can do so to adopt any reasonable theory of the evidence which admits of the defendants innocence, and you should never forget that the law only intends to punish criminals, and that it is the desire of the state that no man should be convicted about whose guilt there is a reasonable doubt.

Requested by the defendant and allowed.

Judge

No

The presumption of innocence prevails through the trial and it is the duty of the jury, if possible, to reconcile the evidence with this presumption.

The law presumes a man innocent of crime until he is proven guilty beyond a reasonable doubt; and the law also presumes that every act of the defendant charged with crime, is lawful and honest, and in determining the guilt of the defendant in this case, it is the duty of the jury to account for the actions and statements of the defendant as being lawful and innocent, if the same can be done by any reasonable ~~or~~ fair

construction of the whole evidence in the case. And if the jury after considering all the evidence in the case, entertains a reasonable doubt as to whether or

not the defendant is guilty then the jury should give the defendant the benefit of such doubt and acquit him.

Requested by the defendant and allowed.

Judge.

No

The court instructs the jury that it is not your duty to look for some theory upon which to convict the defendant, but on the contrary, it is your duty and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown with the innocence of the defendant and acquit.

Requested by the defendant and allowed.

Judge.

No

The interest of the defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed, to entitle the defendant to acquittal at your hands.

Requested by the defendant and allowed.

Judge.

No

The defendants have introduced evidence showing their good reputation for being honest, reputable and citizens of high standing. This evidence in itself is sufficient to raise in your minds a reasonable doubt as to the guilt of the defendants and if it so raises in your minds a reasonable doubt as to the guilt of the defendants, you should vote to acquit them, though no such reasonable doubt as to their guilt would have appeared to you were not this evidence as to their good reputation for being honest, reputable and citizens of good standing been produced before you.

Requested by defendant and allowed.

Judge.

No

Evidence of good character is evidence relevant to the question of guilt or non guilt, and is to be considered by you in connection with the other facts and circumstances in the case. One object in laying it before the jury is to induce the jury to believe from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution and in this connection you must take it into consideration.

Requested by the defendant and allowed.

Judge.

No

You are instructed that in no one thing does criminal law differ from civil law more than in the rule as to intent. In controversies between private parties, the intent with which a thing was done is sometimes important, not always; but crime proceeds only from a criminal mind, manifest in guilty intent.

There is only one criterion by which the guilt of a man is to be tested. It is whether the intent is criminal. It is a principle of our legal system that the essence of an offense is the wrongful intent without which it cannot exist. In recognition of this principle, it is provided in all penal codes that in every crime or public offense, there must exist a union and joint operation of act and intent, or criminal negligence. No amount of intention alone is criminal. No amount of action without the guilty intention is criminal.

Requested by the defendant and allowed.

Judge.

No

You are instructed that the common design is the essence of the charge of conspiracy and that it is necessary in order to establish a conspiracy, to prove a combination of two or more persons by consorted action to accomplish a criminal or unlawful purpose and unless such combination is shown beyond a reasonable doubt, you are to acquit the defendants.

Requested by the defendant and allowed.

Judge.

No

The jury are instructed that the essence of the crime of conspiracy is the intent and the agreement. Unlawful acts of individuals, no matter how numerous, cannot be called a conspiracy unless it appears that the minds of the persons committing such acts had previously met and agreed upon a common purpose, contemplating something unlawful, either as the final object of the agreement or as a means of accomplishing it. Therefore, even if you believe from the evidence that lawless acts were committed, still, unless it is proved beyond a reasonable doubt that the defendants, or some of them, had the intent and came to an agreement which tended to result in such acts, it is your duty to acquit the defendants; and moreover it is not sufficient to convict the defendants to prove even that they conspired to do lawless acts, but the intent itself to commit such unlawful acts must be shown beyond a reasonable doubt; otherwise it is your duty to acquit.

Requested by the defendant and allowed.

Judge.

No

You are instructed that the presumption of innocence with which the defendant is at all times clothed, is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full

benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt.

Requested by the defendant and allowed.

Judge.

No

The interest of the defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed, to entitle the defendant to an acquittal at your hands.

Requested by the defendant and allowed.

Judge.

No

The defendant has introduced evidence of his good character as a man of truth, honesty and integrity. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, it is to be considered by you in connection with the other facts in the case and it may be sufficient to create in your minds a reasonable doubt of his guilt,

although no such doubt whatever existed, but for such good character.

Requested by the defendant and allowed.

Judge.

No

The term reasonable doubt, as used in these instructions is defined by law as follows:

It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every man is presumed to be innocent until he is proven guilty, beyond a reasonable doubt. If upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by and acquittal, for it is not sufficient to establish a probability though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Each member of the jury must be entirely satisfied of the guilt of the defendant before they return a verdict of guilty of the offense embraced within the indictment.

Requested by the defendant and allowed.

Judge.

No

You are instructed that mere probabilities are not sufficient to warrant a conviction of the defendant, nor is it sufficient that the greater weight or preponderance of the evidence supports the charge against him; nor that upon the doctrine of chances it is more probable that the defendant is guilty than innocent; but to warrant a conviction of the defendant he must be proven to be guilty so clearly and conclusively that there is no reasonable theory under the law and the evidence upon which he can be innocent.

Requested by the defendant and allowed.

Judge.

No

You are instructed that under the law and the evidence in this case you may convict either or both of the defendants, provided the evidence convinces you beyond a reasonable doubt that those, the one to be convicted conspired together with some other persons or persons jointly indicted herein or you may find either or both not guilty.

Requested by the defendant and allowed.

Judge.

No

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit.

Requested by the defendant and allowed.

Judge.

[Endorsed]: 5739-B Cr United States of America vs. Guy Rockwell and Ercole Maglione Defendant's Instructions Refused Bledsoe J 1/27/25 FILED JAN 27 1925 CHAS N. WILLIAMS Clerk Edmund L. Smith Deputy

No

You are instructed that even though you find that the defendants may have committed some act in itself unlawful ,nevertheless, if you can reconcile such act, in the light of its surrounding circumstances, with an intent to accomplish an ultimate design in itself lawful, and find that there was a lack of guilty intent, you must acquit the defendants.

Requested by the defendants and allowed.

Judge.

No

You are instructed that an act in order to be unlawful must proceed from a wilfully unlawful intent on the part of the defendants to commit some act known to them to be unlawful; unless this guilty intent is clearly established beyond any reasonable doubt in your minds, you must acquit the defendants.

Requested by the defendants and _____ allowed.

Judge.

No

You are instructed that evidence of good character is in itself just as important evidence as any other evidence that may be introduced and if such evidence when introduced raises in your minds any reasonable doubt as to the guilt or innocence of the defendants you must acquit them.

Judge.

No

You are instructed that, even though you find from the evidence that the defendants did have in their possession certain narcotics which they offered to others, nevertheless, unless you find that there was an intent to commit a crime or if you find that their intent was to assist the ends of justice you must acquit them.

Requested by the defendants and _____ allowed.

Judge

[Endorsed]: 5739-B Cr. U. S. A. vs Guy Rockwell, and Ercole Maglione Defendants' requested Instructions—Refused FILED JAN 28 1925 Chas N. Williams, Clerk Edmund L. Smith Deputy

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA SOUTHERN
DIVISION.

United States of America, Plaintiff,)	
)	
Vs.	)	VERDICT.
)	
Guy Rockwell, and Ercole Maglione,	)	No. 5739-B-Cr.
)	
Defendants.)	

We, the Jury in the above-entitled case, find the defendant, Guy Rockwell

Guilty as charged in the 1st count of the Indictment, and

Guilty as charged in the 2nd count of the Indictment, and

Guilty as charged in the 3rd count of the Indictment, and

Guilty as charged in the 4th count of the Indictment; and the defendant, Ercole Maglione,

Guilty as charged in the 1st count of the Indictment, and

Guilty as charged in the 2nd count of the Indictment, and

Guilty as charged in the 3rd count of the Indictment, and

Guilty as charged in the 4th count of the Indictment,
Los Angeles, California, January 28, 1925.

Walter R. Simons

FOREMAN.

FILED JAN 28 1925 Chas. N. Williams, Clerk
Edmund L. Smith Deputy

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 2nd day of February, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	} No. 5739-B Crim.
vs.	
Guy Rockwell and Ercole Maglione,	
Defendants.	

This cause coming before the court for sentence of defendants herein; Russell Graham, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Guy Rockwell and Ercole Maglione being present in court in the custody of the United States Marshal with their attorneys Arthur L. Veitch, Esq., and Chas. Barnhart, Esq., Attorney Arthur L. Veitch, Esq., presents motion for new trial, and said motion having been denied and an exception having been noted in behalf of defendants herein, the

court pronounces sentence upon defendants Guy Rockwell and Ercole Maglione for the crime of which they stand convicted, namely, conspiracy to violate Harrison Narcotic Act of December 17th, 1914, as amended February 24th, 1919, and Opium Act of February 9th, 1909 as amended May 26th, 1922, and it is the judgment of the court that each defendant herein stand committed to the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years on each count of the Indictment, sentences to run concurrently and that each defendant pay unto the United States of America, a fine in the sum of one dollar on each of the first, second and third counts of the Indictment; and it is further ordered by the court that said defendants Guy Rockwell and Ercole Maglione be granted a ten day stay of execution of sentence.

In the District Court of the United States
IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,	}	No. 5739-B. Crim.
Plaintiff,		
<i>vs.</i>		
Guy Rockwell and Ercole Maglione	}	
Defendants.		

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original JUDGMENT en-

tered in the above-entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said cause.

ATTEST my hand and the seal of said District Court, this 17th day of March A. D. 1925

(Seal)

CHAS. N. WILLIAMS

Clerk.

By B. B. Hansen

Deputy Clerk.

[Endorsed]: No. 5739-B Crim. IN THE DISTRICT COURT of the United States for the Southern District of California Southern Division. United States of America Plaintiff, vs. Guy Rockwell and Ercole Maglione, Defendants. JUDGMENT ROLL. Filed MAR 17 1925 CHAS. N. WILLIAMS, Clerk By B. B. Hansen Deputy Clerk Recorded Min. Book No. 57 Page 246

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

	* * * * *	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs	)	ORDER.
)	
GUY L. ROCKWELL & ERCOLE)	
MAGLIONI,)	
Defendants.)	

Upon the reading and filing of the affidavit of Guy L. Rockwell, one of the defendants above named and

it appearing to the Court that good cause exists therefor:

IT IS HEREBY ORDERED, that an Assignment of Errors identical with that served upon United States Attorney on June 30, 1925, be and the same is hereby ordered filed nun pro tunc as of the date of issuance of the Writ of Error now in force herein.

DATED this 28 day of July 1925.

Wm. P James
Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

* * * * *

UNITED STATES OF)	
AMERICA,)	
Plaintiff,	)	NO. 5739-B. Crim.
)	
-vs-	)	AFFIDAVIT OF DE-
	)	FENDANT GUY L.
GUY L. ROCKWELL &	)	ROCKWELL.
ERCOLE MAGLIONI,)	
Defendants.)	
STATE OF CALIFORNIA,)	
	)	ss.
COUNTY OF LOS ANGELES.)	

Guy L. Rockwell being first duly sworn deposes and says:

That he is one of the defendants above named; that on or about the 12th day of May 1925, a mandate

issued out of the United States Circuit Court of Appeals for the Ninth *District*, dismissing the appeal of the above named defendants, which had theretofore been filed and that said mandate contained a clause granting to the defendants the right to renew their Writ of Error and perfect a new appeal; that at said time the affiant was in a sanitarium and under a physician's care being treated for neuritis and was unable at that time and for many days thereafter to attend to any of his business affairs and that the general health of affiant since such time has been such that he has been unable to competently or efficiently administer his own business affairs; that previous to said 12th day of May 1925, or on or about April 3, 1925, affiant retained O. V. Willson a regularly practicing attorney to represent both the above named defendants on a Hearing of the Motion to Dismiss the first appeal and thereafter to perfect the second appeal; that said O. V. Willson took all of the files and papers in said case with him to Imperial County with the explicit promise to affiant that a Bill of Exceptions would be prepared and filed in due time, but that on or about June 4, 1925, said O. V. Willson without any warning to affiant withdrew from said case and returned the files to affiant notwithstanding the fact that he had been paid in excess of Two Hundred Dollars (\$200.00) toward his fees in said proceeding; that there was not time enough remaining thereafter within which to prepare and file a Bill of Exceptions and that an examination of the record in the case

shows that the second Writ of Error was issued without an assignment of errors being filed; that thereafter affiant retained Stanley Visel who now represents the defendants to perfect said appeal, and upon examination of the record and upon ascertaining that said Writ of Error now in force had been issued without the filing of assignment of errors, said Stanley Visel entered into negotiations with the United States Attorney looking toward the making of a stipulation allowing said assignment of errors to be filed *nun pro tunc* as to the date of issuance of said Writ of Errors; that up to this time said Stanley Visel has been unable to secure said stipulation, and that affiant makes this affidavit as the basis for an order allowing said assignment of errors to be so filed *nun pro tunc* as of the date of issuance of said Writ of Error.

Guy L. Rockwell

Subscribed and sworn to before me this 28th day of July 1925.

[Seal]

Stanley Visel

[Endorsed]: 5739B- IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIV. UNITED STATES OF AMERICA, Plaintiff, vs GUY L. ROCKWELL & ERCOLE MAGLIONI, Defendants. AFFIDAVIT AND ORDER. FILED JUL 29 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy ORIGINAL STANLEY VISEL ATTORNEY AT LAW LOS ANGELES BROADWAY 5767 608 Law Bldg.

ORIGINAL
IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

THE UNITED STATES)

OF AMERICA)

Plaintiff.)

vs.)

GUY L. ROCKWELL, and)
ERCOLE MAGLIONI,)

Defendants.)

Criminal No. 5739 B.

) ASSIGNMENT OF

) ERRORS BY DEFEND-

) ANTS GUY ROCK-

) WELL AND *ECOLE*

) MAGLIONI.

Guy L. Rockwell and Ercole Maglioni, the above named defendants and plaintiffs in error herein, having petitioned for an order from the above named Court permitting them to procure a Writ of Error therefrom, directed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment and sentence made and entered in said cause against the said Guy L. Rockwell and *Ecole* Maglioni, plaintiffs in error and petitioners herein, now make and file with their said petition the following assignments of error upon which they will rely for a reversal of the said judgment and sentence upon the Writ of Error and which said errors and each and every one of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them; and they say that in the record of the proceedings had in the above entitled cause

upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to-wit:

The District Court of the United States in and for the Southern District of California, Southern Division, erred in each and every one of its rulings and decisions (to which exceptions were duly taken and allowed) now here separately and specifically set out and numbered: said rulings and decisions to which exceptions were taken being as follows, to-wit:

I.

In instructing the jury as follows, to-wit:

“Now this is a matter of some importance because it will be determinative of the judgment to be pronounced by this Court if your verdict in this case is to the effect that these defendants were guilty of the crime of conspiracy. If you believe that they were actuated, not by good faith as they say, but that they were actuated by a design and a purpose and intent to effect a sale and distribution of narcotics and not to bring to light violators of the law, and you so find and convict them of the crime of conspiracy, as charged in the fourth count, then this Court will pronounce upon them a sentence that will be in keeping with that conclusion on your part, and, I have no hesitancy in saying at all that any persons in this Court charged with and convicted of dealing in narcotics receives a penitentiary sentence. On the other hand, if these defendants were not concerned with the crime of conspiracy and they were acting in good faith,

even though they did pursue and follow methods that were illegal and that were not open and available to them, but that they did this thing in good faith, but, nevertheless, violated the law,—if you believe that and convict them of these other counts in the transaction which have to do merely with the receiving and concealing and the transporting of narcotics without any authorization from the law, and acquit them of the crime of conspiracy, then I will feel that the violation that they have been guilty of is only a technical violation of the law and made necessarily so merely because of the fact that none may do these things, officer of the law or otherwise, and in such event, if you acquit them of the crime of conspiracy and find them guilty of other counts, I shall administer only a fine because, in my judgment, that will be adequate.”, to which instruction an exception was taken and allowed.

II.

In colloquy between the Court and counsel concerning such exception, the jury was further instructed as follows:

“Mr. Veitch: Expressing my personal opinion in the matter, I believe that an exception should be noted on behalf of the defendants and each of them to that portion of the Court’s charge wherein, referring to the matters of receiving, concealing and facilitating the transportation of narcotics, the element of the presence or absence of a corrupt intent is ignored in the charge, and that the jury are not instructed that the absence of a criminal intent in these matters would necessitate an

acquittal, and that upon that matter, the Court hasn't instructed the jury that if the reception, concealment or the facilitation of transportation of such were shown to be pretended or under a guise and not an actual reception, concealment or facilitation of transportation with the intent to violate the law, then that upon those points the jury, not being satisfied beyond a reasonable doubt of the fact, should acquit. That is said rather haltingly.

The Court: Well, I grasp the point. Your theory is that if the defendants were trying to sell narcotics to somebody so that they could arrest that person, they could receive narcotics and transport them?

Mr. Veitch; No, my point is that if the reception or concealment or transportation were merely apparent and not real—

The Court: But, in this case it was shown they had received the narcotics, they had concealed them in the automobile and they had transported them.

Mr. Veitch; The fact that it is susceptible in this interpretation that it was merely pretended; that in that the reception was made for the officers of the law, the concealment was made for the officers of the law, the facilitation of the transportation was made for the officers of the law in the due administration of justice and these men were merely agents and acting without any authority in fact didn't receive or conceal or transport as an actuality, then under my impression of the statute I feel that the Court should instruct the jury that the defendants should be acquitted.

The Court: Well, I don't think that is the law. These defendants were not authorized by any officers to do anything of the sort. In my judgment no officer would have authority to authorize them to do the thing that they did.

Mr. Veitch; Exception."

to which instruction exception was taken and allowed.

III.

In instructing the jury as follows: to-wit:

The Court: If you believe, beyond a reasonable doubt that these defendants themselves endeavored to effect a sale or distribution of narcotics, not in good faith for the purpose of bringing others to the bar of justice, not in good faith for the purpose of finding out, if possible, malefactors or suspected malefactors, of a violation of the law, if you believe that beyond a reasonable doubt, then you ought to convict them. (referring to conspiracy charge).

Now, there are other things charged against the defendants and with respect to these other things, there isn't really very much in the way of a conflict in the evidence. The defendants are charged in the first count with receiving narcotics; they are charged in the second count with selling narcotics and they are charged in the third count with facilitating, that is, making possible the transportation of narcotics and it is obvious to me—I don't think there is any conflict about it—that they did these things; just exactly as to the degree of responsibility of each of these defendants is a matter for you.

Seemingly they were working together in complete cooperation with respect to the things that they actually did in the particular behalf that I have mentioned, and seemingly, in so far as that is concerned, each are equally responsible. There might be a different punishment to be pronounced on them but seemingly the degree of legal responsibility would be the same but, that is a matter for you, however. You are to determine that by your verdict.

Now, the defendants have said, without any authorization from the officers, so far as that is concerned, *any* authorization that they could go and get narcotics, receive narcotics, and sell narcotics and transport narcotics and deliver narcotics for the purpose of bringing to light violations of the law—the defendants have asserted that they did this thing for the laudable motive of bringing to light known or suspected violations of the law, but they admit that they did that without any authorization from the officers and it must be latent to you that the officers themselves could not give them any authorization to do this thing. Why, the Sheriff of Los Angeles County himself would have no right or authority to go and get somebody to provide him or some one of his deputies or some of us with narcotics and then take those narcotics out and sell them to somebody for the purpose of arresting the person to whom it is sold. The Sheriff of Los Angeles wouldn't have the right to do that and these defendants, even at best, are pernicious intermeddlers in the enforcement of the law here in our midst and they had no business—taking their story at its best and

assuming the correctness of the statements made by them as to their good faith and as to the honesty of their intention—they had no business, and particularly this defendant, the lawyer, had no business to engage in any such nefarious transaction, no authority for it, and if you believe beyond reasonable *dout*, even though they were acting in good faith, that they received narcotics, that they concealed narcotics, that they facilitated the transportation of narcotics, you ought to find them guilty of that, even though you may believe that they were acting in good faith and that they had no corrupt intention and were not guilty of conspiracy.”

to which instruction exception was taken and allowed.

IV.

The Court erred in refusing to permit the witness Byron C. Hanna to answer as to his knowledge of the reputation of the defendant Rockwell for truth in the community, while said witness Byron C. Hanna was upon the stand, his testimony being as follows, to-wit:

DIRECT EXAMINATION

BY MR VEITCH:

Q You are an attorney at law?

A I am.

Q A member of the law firm of Fredericks & Hanna?

A Yes,

Q Of which Mr. John D. Fredericks is your partner?

A Yes

Q You have been in practice for about how many years?

A About seventeen years.

Q And as part of your early experience were you in the District Attorney's office of this County?

A I was, for two years and a half.

* * * * *

Q Now Mr. Hanna, from your knowledge or acquaintance ship with Mr. Rockwell this defendant, and his friends and acquaintances, do you know his general reputation in this community for truth, honesty and—

THE COURT: How is the question of veracity involved? There is no law for bolstering up the testimony of a witness in that way unless it is attacked. You know that the trait involved in this case is his willingness to obey the law, a law-abiding citizen. Veracity is not involved here.

MR. VEITCH: My understanding is, your Honor, that I have a right before the attack, to put on the evidence as to proof—

THE COURT: Where is the authority for it, to bolster up the testimony of the witness previous to his being attacked at this time? Where is the authority?

MR. VEITCH: I have no authority.

THE COURT: You find it and then present the evidence. There is no such law. I never heard of it.

MR. VEITCH: Exception.

THE COURT: Go on.

to which instruction exception was taken and allowed.

V.

The court erred in refusing to grant the motion for a new trial herein for each and everyone of the reasons set forth in said motion.

VI.

The court erred in refusing to give each and every instruction requested by the defendants and refused by the court.

Dated at Los Angeles, California this day of January, 1925.

Arthur L Veitch

Chas A Barnhart

Ira L Brunk

Attorneys for defendants Guy Rockwell
& Ecole Maglioni

We hereby certify that the foregoing assignment of error is made on behalf of the petitioners for a writ of error herein and are in our opinion well taken and the same now constitutes the assignment of errors upon the writ prayed for.

Arthur L Veitch

Chas A Barnhart

Ira L Brunk

Attorneys for defendants Guy Rockwell
& Ecole Maglioni

[Enodrsed]: ORIGINAL Criminal No. 5739B-
IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALIFOR-
NIA SOUTHERN DIVISION. U. S. OF AMER-
ICA, Plaintiff vs. GUY L. ROCKWELL and ERCOLE

MAGLIONI. Defendants ASSIGNMENT OF ERRORS BY DEFENDANTS GUY L. ROCKWELL AND ERCOLE MAGLIONI FILED MAY-11-1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy ARTHUR L. VEITCH Attorney at Law 517-18-19 Hollingsworth Building 608 South Hill Street Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF)
AMERICA, :
Plaintiff,) No. 5739-B Crim.,
:
-vs-)
: PETITION OF DEFEND-
GUY L. ROCKWELL &) ANTS FOR
ERCOLE MAGLIONI, : WRIT OF ERROR.
Defendants,)

* * * * *

TO THE HONORABLE *CUICUIT* COURT OF APPEALS, UNITED STATES OF AMERICA, NINTH CIRCUIT:

Your petitioners, Guy L. Rockwell and Ercole Maglioni, the defendant in the above entitled cause, bring this, their petition for a writ of error, to the District Court of the United States, in and for the Southern District of California, and in this behalf your petitioners respectfully show:

That on the 2nd day of February, 1925, there was made, given and entered in the above entitled court and cause a judgment against your petitioners whereby your petitioner Guy L. Rockwell was *order* to be imprisoned for a period of two (2) years on the first count, and a period of two (2) years on the second count, and a period of two (2) years on the third count, and a period of two (2) years on the fourth count; and your petitioner Ercole Maglioni was adjudged and sentenced to be imprisoned for a period of two (2) years on the first count, and a period of two (2) years on the second count, and a period of two (2) years on the third count, and a period of two (2) years on the fourth count, and your petitioners say that they are advised by their counsel and aver that there was and is manifest error in the records and proceedings had in said cause, and in the giving, making and entering of such judgments and sentences to the great injury and damage of your petitioners, and each of them and each and all of which errors will be more fully made to appear by an examination of said records and by an examination of the Bill of Exceptions and Assignments of Errors which are filed with this petition, and to the end that the judgments, sentences and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners, and each of them pray that a writ of error may be issued, directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, return-

able according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy of the record. Bill of Exceptions, Assignment of Errors and all proceedings had, or to be had in said cause, and that the same may be removed unto the Circuit Court of Appeals of the United States for the Ninth Circuit, to the end that error, if any has happened, may be duly corrected and full and speedy justice done your petitioners and each of them.

And that your petitioners make a part of this petition, the Assignment of Errors, filed herewith, upon which they, and each of them, will rely and which will be made to appear by a return of the said record in obedience to said writ.

WHEREFORE your petitioners, and each of them, pray the issuance of a writ as herein prayed and that the Assignment of Errors filed herewith may be considered as their Assignment of Errors upon the writ, and that the judgments rendered in this cause may be reversed and held for naught and that said cause be remanded for further proceedings and that they and each of them be awarded a supersedeas upon said judgment and all necessary process, including bail pending the hearing and determination of said Writ of Error.

O. V. Willson

Guy L. Rockwell

Ira L. Brunk

Ecole Maglioni

Attorneys for Petitioners.

Petitioners.

[Endorsed]: Original. No. 5739-B. Criminal IN
THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALIFOR-

NA SOUTHERN DIVISION UNITED STATES
 OF AMERICA, Plaintiff, -vs- GUY ROCKWELL &
 ERCOLE MAGLIONI, Defendants. PETITION
 OF DEFENDANTS FOR WRIT OF ERROR.
 Filed May 11 1925 CHAS. N. WILLIAMS, Clerk
 G F Gibson Deputy O. V. Wilson Washington
 Bldg. Atty for Defendant Guy Rockwell Ira L.
 Brunk 321 W. 3rd St. Atty for Defendant Ercole
 Maglioni.

IN THE DISTRICT COURT OF THE UNITED
 STATES, IN AND FOR THE SOUTHERN
 DISTRICT OF CALIFORNIA,
 SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA, :	
Plaintiff,)	
:	No. 5739-B Crim.,
-vs-)	
:	
GUY ROCKWELL &)	ORDER ALLOWING
ERCOLE MAGLIONI, :	WRIT.
)	
Defendants, :	

* * * * *

On this 11th day of May, 1925, came the defend-
 ants by their attorneys and filed herein and presented
 to the court their petition praying for the allowance
 of a writ of error intended to be urged by them; pray-
 ing also that a transcript of the record, proceedings
 and papers upon which the judgment herein was ren-
 dered be made, duly authenticated, and sent to the
 United States Circuit Court of Appeals for the Ninth

Judicial Circuit, and that such other and further proceedings may be herein had as may be proper in the premises.

On consideration whereof, it is ordered by the court that the said writ of error be and is hereby allowed, and that said writ of error shall operate as a supersedeas, and that no further proceedings shall be had in this cause in this court until the final determination thereof in the said United States Circuit Court of Appeals, upon the filing of the approval by the court of a good and sufficient bond in the penal sum of Ten thousand dollars (\$10,000.00) each, which bond shall operate as a supersedeas bond.

Wm P James

United States District Judge.

[Endorsed]: Original No. 5739-B Criminal IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff -vs- GUY ROCKWELL & ERCOLE MAGLIONI, Defendants, ORDER ALLOWING WRIT FILED MAY 11 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy O. V. Wilson Washington Bldg. Atty for Deft Guy Rockwell Ira L Brunk 321 W 3rd St Atty for Deft Ercole Maglioni.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

UNITED STATES OF)	
AMERICA, :	
Plaintiffs)	No. 5739-B Crim.,
:	
-vs-)	
:	
GUY ROCKWELL &)	SUPERSEDEAS BOND.
ERCOLE MAGLIONI, :	
Defendants,)	

* * * * *

KNOW ALL MEN BY THESE PRESENTS:

That we, Ercole Maglioni as principal, and Cono Macchiaroli and Mattios Sarin as surities, are held and bound unto the United States of America in the penal sum of Ten thousand (\$10,000) dollars to be paid to the United States of America, to which payment well and truly to be made we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of May in the year of our Lord One thousand nine hundred and twenty-five.

WHEREAS, Lately at a session of the District Court of the United States in and for the Southern District of California, Southern Division, sitting at Los Angeles, in a suit pending in said court between the United States of America, plaintiff and Guy Rock-

well and Ercole Maglioni, defendants, a judgment was rendered against the said Guy Rockwell and Ercole Maglioni on the 2nd day of February, A. D. 1925; and

WHEREAS, the said Ercole Maglioni has sued out a writ of error from the Judgment of the said District Court of the United States in said cause No. 5739-B Crim., wherein the United States of America is plaintiff and the said Ercole Maglioni is defendant, for a review of the said judgment before and by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

NOW THEREFORE, if the said Ercole Maglioni shall personally be and appear before the said United States Circuit Court of Appeals for the Ninth Judicial Circuit on the first day of the regular term thereof, and appear from day to day thereafter during the said term and each and every subsequent term until the determination of said writ of error, and shall prosecute the said writ of error with due diligence, and shall appear and hear and abide by and perform any and all orders or order, mandates or mandate, decree or decrees, judgment or judgments which may be therein rendered, and shall not depart from the said district nor depart from its jurisdiction without due leave thereto first had and obtained, and if the judgment in the said cause is affirmed shall render himself in execution thereof, to and before the said District Court, then this recognizance shall be void, otherwise to remain in full force and effect.

Ercole Maglione
Principal.

X

Cono Macchiaroli
Sureties.

Matteo Sarni, being first duly sworn, deposes and says:

That he is a householder in said Southern District of California, and he is well worth the sum of Ten thousand dollars (\$10,000.00) and is worth the amount specified in the above undertaking as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt from execution.

Address 236½ So. Griffin st
Los Angeles

Subscribed and sworn to before me this 11th day of
May, 1925.

Raymond I Turney

UNITED STATES COMMISSIONER.

* * * * *

Cono Macchiaroli, being first duly sworn deposes and says:

That he is a householder in said Southern District of California, and is well worth the sum of Ten thousand (\$10,000.00) dollars, and is worth the amount specified in the above undertaking as the penalty thereof, over and above all his just debts and liabilities and exclusive of property exempt from execution.

His X

Mark Cono Macchiaroli

Address 120 Santa Ana St

Walnut Park Cal

Subscribed and sworn to before me this 11th day of
May, 1925.

Raymond I Turney

UNITED STATES COMMISSIONER.

I hereby approve the written undertaking as to form and as to sufficiency of Sureties therein.

(Seal) Raymond I Turney

UNITED STATES COMMISSIONER.

I hereby approve the foregoing bond.

Dated this 11th day of May, 1925.

Wm P James

United States District Judge.

[Endorsed]: Original No. 5739-B Criminal. IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFOR-

NIA SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, -vs- GUY ROCKWELL & ERCOLE MAGLIONI, Defendants, SUPERSEDEAS BOND FILED MAY 11 1925 CHAS. N. WILLIAMS, Clerk G F Gibson Deputy O. V. Wilson Washington Bldg. Atty for Deft Guy Rockwell & Ira L. Brunk 321 W 3rd St. Atty for Deft Ercole Maglioni.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,)	No. 5739-B Crim.,
Plaintiff,)	
)	SUPERSEDEAS BOND.
-vs-)	
)	
GUY ROCKWELL &)	
ERCOLE MAGLIONI,)	
Defendants.	

KNOW ALL MEN BY THESE PRESENTS:

That we, Guy Rockwell as principal, and Rosie Sandello and Joe Grabielle as sureties, are held and bound unto the United States of America in the penal sum of Ten Thousand (\$10,000.00) Dollars to be paid to the United States of America, to which payment well and truly to be made we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of May, in the year of our Lord One Thousand Nine Hundred and Twenty Five.

WHEREAS, Lately at a session of the District Court of the United States in and for the Southern District of California, Southern Division, sitting at Los Angeles, in a suit pending in said Court between the United States of America, plaintiff, and Guy Rockwell and Ercole Maglioni, defendants, a judgment was rendered against the said Guy Rockwell and Ercole Maglioni on the 2nd day of February, A. D. 1925: and

WHEREAS, the said Guy Rockwell has sued out a writ of error from the Judgment of the said District Court of the United States in said cause No. 5739-B Crim., wherein the United States of America is plaintiff and the said Guy Rockwell is defendant, for a review of the said judgment before and by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

NOW THEREFORE, if the said Guy Rockwell shall personally be and appear before the said United States Circuit Court of Appeals for the Ninth Judicial Circuit on the first day of regular term thereof, and appear from day to day thereafter during said term and each and every subsequent term until the determination of said writ of error, and shall prosecute the said writ of error with due diligence, and shall appear and hear and abide by and perform any and all orders or order, mandates or mandate, decree or decrees, judgment or judgments which may be therein

rendered, and shall not depart from the said district nor depart from its jurisdiction without due leave thereto first had and obtained, and if the judgment in said cause is affirmed shall render himself in execution thereof, to and before the said District Court, then this recognizance shall be void, otherwise to remain in full force and effect.

WITNESS our hands at Los Angeles, California, this 20th day of May, 1925.

Guy Rockwell

Principal.

Rosie Sandello

His Mark Joe Gabrielle

X

Sureties.

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF CALIFORNIA

) SS

Rosie Sandello, being first duly sworn, deposes and says:

That she is a householder in said Southern District of California, and she is well worth the sum of Ten Thousand Dollars (\$10,000.00) and is worth the amount specified in the above undertaking as the penalty thereof, over and above all her just debts and liabilities, and exclusive of property exempt from execution.

Assets

Mrs. Rosie Sandello

1324 Lawrence St.

3 Lots Lorraine and

Concord streets

Assets

Joe Gabrielle

2159 E 11 st

Lots 49-50-51

P. J. Brannen Tract

Value \$21,000 Clear
Separate property,
Widow

Value \$45,000 Clear
Separate property,
Widower

Rosie Sandello

Address 1324 Lawrence St.
L. A.

Subscribed and sworn to before me this 20 day of May, 1925.

Raymond I. Turney
UNITED STATES COMMISSIONER.

UNITED STATES OF AMERICA)
) SS
SOUTHERN DISTRICT OF CALIFORNIA)

Joe Grabielle, being first duly sworn deposes and says:

That he is a householder in said Southern District of California, and is well worth the sum of Ten Thousand (\$10,000.00) dollars, and is worth the amount specified in the above undertaking as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt from execution.

Joe Gabrielle

His Mark

X

Address 2159 E 11th St.

L. A.

Subscribed and sworn to before me this 20 day of May, 1925.

Raymond I. Turney (SEAL)
UNITED STATES COMMISSIONER.

I hereby approve the written undertaking as to form and as to sufficiency of Sureties therein.

Raymond I. Turney
UNITED STATES COMMISSIONER.

I hereby approve the foregoing Bond.

Dated this 20 day of May, 1925.

Wm P James
UNITED STATES DISTRICT JUDGE.

[Endorsed]: (ORIGINAL) No. 5739-B Crim.
In The UNITED STATES DISTRICT COURT
Southern District of California Southern Division
UNITED STATES OF AMERICA, Plaintiff vs.
GUY ROCKWELL AND ERCOLE MAG/LIONI
Defendants SUPERSEDEAS BOND Received copy
of within bond this 18th day of May, 1925 FILED
MAY 20, 1925 CHAS. N. WILLIAMS, Clerk G. F.
Gibson Deputy J. Edwin Simpson Attorney for U. S.
of A. O. V. Willson, 508 Washington Building, At-
torney for Defendant, Guy Rockwell. Ira L. Brunk,
321 W. 3rd St., Attorney for Defendant, Ercole Magi-
lioni.

UNITED STATES OF AMERICA
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

United States of America	}	Clerk's Office
Plaintiff		
vs.	}	
Guy Rockwell and		No. 5739-B.—
Ercole Maglioni		
Defendants	}	Praecipe

TO THE CLERK OF SAID COURT:

Sir:

Please issue Citation, Writ of Error, Judgt. Roll, Assignment of Errors, Order with affidavit attached, Petition for Writ of Error, Order Allowing Writ of Error, (2) Supersedeas Bonds and Praecipe

Guy L. Rockwell

Stanley Visel

Atty for Defts.

[Endorsed]: No. 5739-B U. S. District Court
SOUTHERN DISTRICT OF CALIFORNIA United
States of America Pltff v. Guy Rockwell and Ercole
Maglioni Defts PRAECIPE FILED AUG 5, 1925
CHAS. N. WILLIAMS Clerk. By R S Zimmerman
Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,)	
	)	CLERK'S
Plaintiff,)	
vs.)	
	)	CERTIFICATE.
GUY ROCKWELL & ERCOLE)	
MAGLIONI,)	
Defendants.)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 75 pages, numbered from 1 to 75 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiffs-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, judgment roll, assignment of errors, order with affidavit attached, petition for writ of error, order allowing writ of error, supesedeas bonds, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiffs-in-error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of August, in the year of Our Lord One Thousand Nine Hundred and Twenty-five, and of our Independence the One Hundred and Fiftieth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.



5

United States
Circuit Court of Appeals
For the Ninth Circuit.

K. MATUSAKE,

Plaintiff in Error,

.. vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

AUG 25 1905

F. A. MORGENTHAU

1

2

3

United States
Circuit Court of Appeals
For the Ninth Circuit.

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

ADAM BEELER, Esq., Attorney at Law, 1808 L. C.
Smith Building, Seattle, Washington,
Attorney for Plaintiff in Error.

A. G. McBRIDE, Esq., Attorney at Law, 525 Pa-
cific Block, Seattle, Washington,
Attorney for Plaintiff in Error.

THOS. P. REVELLE, Esq., 310 Federal Building,
Seattle, Washington,
Attorney for Defendant in Error.

J. W. HOAR, Esq., 310 Federal Building, Seattle,
Washington,
Attorney for Defendant in Error. [1*]

(Comm'r. #2623-B. \$500.)

EDWARD E. CUSHMAN.

United States District Court, Western District of
Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATSUSAKE,
Defendant.

*Page-number appearing at foot of page of original certified Trans-
script of Record.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 23d day of June, in this same term, and for the said United States gives the Court here to understand and be informed [2]

COUNT I.

That on the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, K. MATSUSAKE (whose true given name is to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, one hundred eighty-five (185) gallons of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said K. MATSUSAKE for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, barter-

ing, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said K. MATSUSAKE as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That on the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at 606 Sixth Avenue South, in the said City of Seattle, K. MATSUSAKE (whose true given name is to the said United States Attorney unknown), then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said K. MATSUSAKE as aforesaid, was then and there unlawful and prohibited by the Act of Congress

passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.

J. W. HOAR,
Special Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATUSAKE,

Defendant.

ARRAIGNMENT AND PLEA.

Now on this 17th day of November, 1924, the above defendant comes into open court for arraignment accompanied by his attorney A. G. McBride and says that his true name is K. Matusake. Whereupon he here and now enters his plea of not guilty.

Journal No. 12, page 467. [5]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATUSAKI,

Defendant.

TRIAL.

Now, on this 18th day of December, 1924, this cause comes on for trial with defendant present accompanied by his attorney A. G. McBride. A jury is empaneled and sworn as follows: Charles Brockman, Misall Chabot, F. W. Ellis, John P. Reynolds, Thomas M. Reeder, H. J. Hart, R. W. Thompkins, H. B. Ellis, A. J. Browning, Colin Campbell, J. S. N. Schmidt, and J. S. Grant. Opening statement is made to the jury by counsel for the Government, Government witnesses are sworn and examined as follows: Walter Justi, W. M. Whitney, H. B. Mooring and C. W. Cline. Government exhibits numbered 1, 2, 3, 4, 5, 6 and 7 are introduced as evidence. Government rests. Defendant moves to strike all evidence adduced for the reason of a defective search-warrant. Said motion is denied with exception allowed. Defendant's witnesses are sworn and examined as follows: U. C. Griffin, K. Matusake, through an interpreter, Ira Pearshall, Y. Uchida, K. Emura. Defendant rests.

Government witnesses in rebuttal are sworn and examined as follows: Justi, Whitney, Mooring. Jury is admonished and excused until 9:30 A. M. at which time cause is likewise continued.

Journal No. 13, page No. 44. [6]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATUSAKE,

Defendant.

TRIAL RESUMED.

Now on this 19th day of December, 1924, this cause comes on for further trial. Defendant is present in court and argument is had. The jury after being admonished retire for deliberation. Thereafter jury returned into open court and all are present and a verdict is returned. Verdict reads as follows: "We, the jury in the above-entitled cause, find the defendant, K. Matusake, is guilty as charged in Count I of the Information herein; and further find the defendant, K. Matusake, is guilty as charged in Count II of the Information herein.

R. W. THOMPCKINS,

Foreman."

Journal No. 13, page No. 45. [7]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATUSAKE,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find the
defendant, K. Matusake, is guilty as charged in
Count I of the Information herein; and further find
the defendant, K. Matusake, is guilty as charged
in Count II of the Information herein.

R. W. TOMPKINS,

Foreman.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Dec. 19, 1924. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [8]

In the United States District Court, Western
District, Northern Division.

No. 8652.

UNITED STATES,

Plaintiff,

vs.

M. MASSUSAKE,

Defendant.

MOTION FOR A NEW TRIAL.

The said defendant moves the Court to set aside the verdict in said cause and grant a new trial for the following reasons:

First: Errors of law occurring at the trial and excepted to at the time by the defendant which prevented the defendant from having a fair trial.

Second: Newly discovered evidence.

Third: The verdict is not supported by the evidence and is contrary to the testimony in said cause.

A. G. McBRIDE,

Attorney for Defendant.

Received a copy of the foregoing motion.

District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 5, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [9]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATUSAKE,
Defendant.

HEARING ON MOTION FOR NEW TRIAL.

Now on this 5th day of January, 1925, this cause
comes on for hearing on motion for new trial, with
A. G. McBride as counsel for defendant, present.
Motion is denied with exception allowed.

Journal No. 13, page 81. [10]

United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATUSAKE,
Defendant.

SENTENCE.

Comes now on this 6th day of January, 1925,
the said defendant, K. Matusake, into open court

for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said. Wherefore, by reason of the law and the premises, it is CONSIDERED, ORDERED, and ADJUDGED by the Court that the defendant is guilty of violating the National Prohibition Act, and that he be punished by being imprisoned in the Whatcom County Jail or in such other place as *may hereafter* provided for the imprisonment of offenders against the laws of the United States for the term of three months on Count II, and to pay a fine of \$300.00 *Dollars* on Count I; that execution issue therefor and that he be placed in the custody of the United States Marshal until such fine is paid, or until he shall be otherwise discharged by due process of law.

Judgment and Decree No. 4, page 250. [11]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATUSAKE,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Above-entitled Court and to the Honorable
JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant by his attorney, Adam Beeler, and shows that on the 19th day of December, 1924, a jury impaneled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the information theretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law under the rules of this court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception thereto allowed; and thereafter, on the 5th day of January, 1925, the defendant was, by order and judgment and sentence of the above-entitled court in said cause, sentenced as follows:

On Count I of the Information, to pay a fine of Three Hundred Dollars (\$300.00).

On Count II of the Information, to imprisonment for three months in Whatcom County Jail.

And, your petitioner herein, feeling himself aggrieved by said verdict, judgment and sentence of the court, entered herein as aforesaid, and by the orders and rulings of said court and proceedings in said cause, now herewith petitions this court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance [12] with the pro-

cedure of said court made and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing on the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and the ruling of the Court provided.

WHEREFORE, the premises considered your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, Northern Division, may be reviewed and corrected; said error in said record being herein assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination that said defendant be admitted to bail.

ADAM BEELEER,

Attorney for Petitioner, Plaintiff in Error.

Acceptance of service of the within petition for writ of error acknowledged this 6th day of January, 1925.

THOS. P. REVELLE,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jan. 6, 1925. Ed. M. Lakin, Clerk.
By S. M. H. Cook, Deputy. [13]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

ASSIGNMENT OF ERRORS.

Comes now the above-named defendant, K. Matusake, and in connection with his petition for writ of error in this case submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause and court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing, upon the face of the record, and in the proceedings, is this:

1. That the defendant prior to the trial of said cause filed two motions, one of which motion was entitled "Motion to Suppress Evidence and Dismiss the Action" and the other of which motions was entitled "Motion and Affidavit to Quash Warrant," which said two motions were

heard and considered together and at the same time by the court and were both denied by the court, and to which ruling the defendant then and there excepted for the reason and upon the ground that the evidence was illegally and unlawfully seized and obtained, and the defendant's person and premises were illegally and unlawfully searched in that the search and seizure was made without any valid search-warrant, but was made upon a purported search-warrant which was in law an invalid search-warrant in that the premises searched were not properly described, and further that the search-warrant itself [14] failed to state any probable cause for the issuance of the same, and for the further reason and upon the ground that a certain paper taken from the person of the defendant was taken in violation of the Constitution of the United States and particularly in violation of the Fourth and Fifth Amendments to the Constitution of the United States, which exceptions were by the Court allowed and now the defendant assigns as error the ruling of the Court upon the said motion.

2. That during the course and progress of the trial of the defendant herein, the defendant made due and timely exceptions to the introduction of the evidence on the grounds and for the reason that said evidence and also the testimony relating thereto was obtained unlawfully and by virtue of an illegal and void search-warrant, which objections were by the Court overruled, and to which ruling exceptions were by the Court allowed and now the defendant

assigns as error the ruling of the Court upon such exceptions.

3. Thereafter, and within the time limited by law, and the orders and rules of the court, the defendant moved the Court for an order granting to him a new trial, which motion was denied by the Court, to which ruling of the Court the defendant then and there duly excepted, and the exception was by the Court allowed; and now the defendant assigns as error the ruling of the Court upon such said motion.

And as to each and every assignment of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly asked and was allowed an exception to the ruling and order of the Court.

ADAM BEELER,
Attorney for Defendant.

Acceptance of service of within assignment of errors acknowledged this 6th day of January, 1925.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [15]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MATSUSAKE,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

A writ of error is granted this 6th day of January, 1925, and it is further ORDERED that pending the review herein, said defendant be admitted to bail and that his supersedeas bond be fixed at Two Thousand Dollars (\$2,000.00); and it is further

ORDERED, that upon said defendant, K. Massusake, filing his bond in the aforesaid sum in due form, to be approved by the clerk of this Court, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court this 6th day of January, 1925.

EDWARD E. CUSHMAN,

Judge.

Received a copy of the above order this 6th day of January, 1925.

THOS. P. REVELLE,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jan. 6, 1925. Ed. M. Lakin, Clerk. By
S. M. H. Cook, Deputy. [16]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS:
That we K. Matusake, as principal, and National
Surety Company, as surety, are held and firmly
bound unto the United States of America, plaintiff
in the above-entitled action, in the penal sum of
Two Thousand (\$2,000.00) Dollars, lawful money
of the United States for the payment of which, well
and truly to be made, we bind ourselves, our and
each of our heirs, executors, administrators and as-
signs, jointly and severally, firmly by these presents.

The condition of this obligation is such, that,
whereas, the above-named defendant, K. Matusake,
was on the 5th day of January, 1925, sentenced in
the above-entitled cause as follows:

On count I of the information, to pay a fine of
Three Hundred Dollars, (\$300.00); on count II of
the information to imprisonment for three months
in Whatcom County Jail;

And, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Two Thousand Dollars (\$2,000.00);

NOW, THEREFORE, if the said defendant, K. Matusake, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 5th day of January, 1925.

[Corporate Seal] K. MATSUSAKE,
Principal.
[Seal] NATIONAL SURETY COMPANY.
By C. B. WHITE,
Attorney-in-fact,
Surety. [17]

Approved, Jan. 6th, 1925.

A. C. BOWMAN,
U. S. Comm'r.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [18]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

K. MASSUSAKE,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING MARCH 3, 1925, TO FILE BILL OF EXCEPTIONS.

For good cause now shown, it is ORDERED that the time within which the defendant shall serve

and file his proposed bill of exceptions in the above-entitled cause be and the same hereby is extended to and including the 3d day of March, 1925.

Dated this 6th day of January, 1925.

EDWARD E. CUSHMAN,
United States District Judge.

Received copy of above order this 6th day of January, 1925.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [19]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MASSUSAKE,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING MARCH 16, 1925, TO FILE BILL OF EXCEPTIONS.

For good cause now shown, it is ORDERED that the time within which the defendant shall serve and file his proposed bill of exceptions in the above-

entitled cause be and the same hereby is extended to and including the 16th day of March, 1925.

Dated this 2d day of March, 1925.

EDWARD E. CUSHMAN,
United States District Judge.

Received copy of above order this 2d day of March, 1925.

J. W. HOAR,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 2, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [20]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8652.

THE UNITED STATES,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

BILL OF EXCEPTIONS.

On the 1st day of December, 1924, at the hour of 10:00 o'clock A. M., said cause came on regularly for hearing on the motion of defendant to quash the search-warrant issued and served in said action, and also, on the motion of defendant to suppress certain evidence, both of said motions were heard

by the Court at the same time, Judge E. E. Cushman presiding, the plaintiff appeared by its assistant district attorney, C. T. McKinney and the defendant appeared in person and by his attorney, A. G. McBride.

The said motion to quash was in words and figures as follows:

United States District Court, Western District,
Northern Division.

THE UNITED STATES,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

MOTION TO QUASH WARRANT.

The said defendant moves the Court to quash the search-warrant issued herein and set aside the alleged service for the reasons following:

1st. That no inventory was ever made, verified and filed with this court as is required by law and ordered by the Court. [21]

2d. That the return on the alleged search-warrant does not show a true report of the acts of the officer executing the same as ordered so to do by the Court in said warrant in this, that the officer executing the same forcibly took from the person of the said defendant one written contract lease.

3d. That no search-warrant was given to defendant and he was not given a receipt when said

paper was taken from him, or at all, as the law directs.

4th. That the search-warrant did not command the officer serving it to bring the property seized before the court as the law directs.

5th. That defendant's name did not appear in said search-warrant.

6th. That defendant's only place of business is at 604½ Sixth Ave., South Seattle, *and includes* hotel roomers living therein, consisting of two upper floors and more than fifty rooms and apartments and faces on said Sixth Avenue aforesaid, and there is no other building in Seattle of the same number and no search was made of said hotel and apartment house. That number 606 is in the basement of said building aforesaid. That Cascade Soda Co. is the lessee of said 606.

7th. That the search-warrant fails to state names of the persons who made the affidavits supporting probable cause in the affidavit filed for a search-warrant and failed to state any probable cause for issuing the same.

8th. That the complaint and search-warrant do not describe any place owned by or in the possession of defendant, or under his control.

9th. That the affidavit upon which the search-warrant was issued did not state or show that the property to be seized under said warrant for search and seizure was used as means of committing a felony as the law directs.

10th. That said warrant fails to describe any place other than said No. 606, First Ave., South and

did not name defendant as owner of any other place, and did not name defendant as owner of said number 606.

11th. That the rooms searched were not described in the search-warrant.

Oral and written evidence will be offered in support of this motion.

A. G. McBRIDE,
Attorney for Defendant.

State of Washington,
County of King,—ss.

K. Massusake, being sworn, says he is the within named defendant and has heard, read the foregoing motion and affidavit and knows the contents thereof and believes the same to be true. [22]

K. MASSUSAKE.

Sworn to before me this 15th day of July, 1924.
[Notarial Seal] A. G. McBRIDE,
Notary Public in and for the State of Washington,
Residing at Seattle.

The said motion to suppress evidence was in words and figures, as follows:

United States District Court, Western District,
Northern Division.

THE UNITED STATES,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

MOTION TO SUPPRESS EVIDENCE AND DISMISS THE ACTION.

The said defendant moves the Court to suppress as evidence in this cause and return the same to defendant, one certain written lease contract forcibly taken from the person of this defendant by Prohibition Agent H. J. Stetson and W. M. Whitney, and also for an order dismissing this action and quashing the search-warrant for the following reasons:

I.

That said written contract forcibly taken from defendant's person is a private paper, belonging to defendant and is a written lease between defendant and one other party for rooms in a building situate in the city of Seattle, and said contract was never used as a means for committing any crime or felony or other offense and particularly, the offense charged herein and is only of evidentiary value, and defendant asks that said evidence be suppressed.

II.

That said H. J. Stetson, prohibition agent, unlawfully searched the person of this defendant without having search-warrant authorizing him so to do, or any search-warrant in which the name of this defendant appeared. That private papers cannot lawfully be taken with or without a search-warrant, if taken against the will of the defendant for the reason that the same is prohibited by the Fifth Amendment to the Constitution of the United

States and also under the decision of the Supreme Court of the United States.

III.

That said defendant committed no crime, felony or misdemeanor in the presence of said officer when defendant [23] was arrested and searched as aforesaid, and said officer did not inform defendant that he was an officer and no search-warrant or receipt were given to defendant and said search and arrest without a warrant were a violation of this defendant's constitutional and treaty rights and said acts were illegal and void.

IV.

That about the time of the search and arrest of defendant as aforesaid, said prohibition agent aforesaid was serving a search-warrant on parties named therein, but defendant's name was not in said warrant, and when this defendant was arrested, he was only a bystander. And said officer in his return on said warrant made no mention of having searched the person of the defendant and of taking of the lease as aforesaid, and did not file any inventory or the same as the law directs which is made a crime under the penal laws of the United States.

V.

That the information contained in the lease unlawfully obtained as hereinbefore stated, was used by the prosecution in this cause in the preparation of the criminal complaint herein. That the said lease contained a description of rooms unknown to said officers and by the use thereof defendant

is compelled to furnish testimony and information against himself in violation of his constitutional right under the Fifth Amendment to the Constitution of the United States, in this action, if the same is continued. That the affidavit, search-warrant and return are all void and should be quashed.

In support of the motions herein contained, defendant submits the following affidavit, the files in this cause and possibly oral evidence.

A. G. McBRIDE,
Attorney for Defendant.

State of Washington,
County of King,—ss.

K. Massusake being sworn says he is the defendant in the within entitled cause of action; that he has read the same and knows the contents thereof and that the allegations and statements therein made are true.

K. MASSUSAKE.

Sworn to before me this 15th day of July, 1924.

[Notarial Seal]

A. G. McBRIDE,
Notary Public in and for the State of Washington,
Residing at Seattle.

The defendant offered in evidence the affidavit for a search-warrant, the search-warrant and return of the officers, in words and figures as follows:
[24]

United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR
SEARCH-WARRANT.

W. M. Whitney, being first duly sworn, on his oath, deposes and says: That he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said district; That a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the city of Seattle, county of King, State of Washington, and within the said district of Washington, and division above named, one K. Hara, H. Y. Oka, W. Wanitamo and K. Yokyo, true name unknown to this affiant, proprietors and their employees, 606 6th Avenue South on the 11th day of March, 1924, and thereafter was, and is possessing a still and distilling apparatus and materials designed and intended for the use in manufacturing intoxicating liquor, and is manufacturing, possession, transporting, and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said 11th day of March, 1924, and on previous occasions detected the odor of intoxicating liquor on said premises, and that said premises is not used as a residence but as a manufacturing plant all on the premises described as 606 6th Avenue South, Seattle, Washington, including the two doors on

each side thereof and the premises on each side of the rear thereof and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties; all being in the county of King, State of Washington and in said district; ALL in violation of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, the said affiant hereby asks that a search-warrant be issued directed to the United States Marshal for the said district and his deputies, and to any Federal Prohibition Officer or Agent, or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said above-named persons, and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor, materials, containers, papers and means of committing the crime aforesaid, all as provided by law and said act.

W. M. WHITNEY.

Subscribed and sworn to before me this 12th day of March, 1924.

[Seal]

H. S. ELLIOTT,

United States Commissioner Western District of
Washington.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, H. S. Elliott, United States Commissioner for the Western District of Washington, Northern Division, do hereby certify that the application and affidavit for search-warrant contained on the reverse side hereof is a true and exact copy in my office and upon which search-warrant was issued on the 12th day of March.

H. S. ELLIOTT,
U. S. Commissioner, Western District of Washington, Northern Division. [25]

United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and his Deputies, or Either of Them, and to Any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of said State, and to the United States Commissioner of Internal Revenue, his Assistants, Deputies, Agents, or Inspectors, GREETING:

WHEREAS, W. M. Whitney, a Federal Prohibition Agent of the State of Washington, has this day made application for a search-warrant and made

oath in writing, supported by affidavits, before the undersigned, a commissioner of the United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the National Prohibition Act of Congress by one K. Hara, R. Y. Oka, and K. Yokyo, true name unknown, proprietors and their employees, 606 6th Avenue South, who was, on the 11th day of March, 1924, and is, at said time and place, *possession* a still and distilling apparatus and materials designed and intended for use in manufacturing intoxicating liquor, and manufacturing, possession, transporting, and selling intoxicating liquor, all for beverage purposes, on certain premises in the city of Seattle, county of King, State of Washington, and in said district, more fully described as 606 6th Avenue South, Seattle, Washington, including the two doors on each side thereof and the premises on each side to the rear thereof and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the President of the United States to enter said premises with such proper assistance as may be necessary, in the daytime, or night-time, and then and there diligently investigate and

search the same and into and concerning said crime, and to search the person of said above-named persons, and from him or her, or from said premises seize any or all of the said property, documents, papers and materials so used in or about the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

Given under my hand and seal this 12th day of March, 1924.

H. S. ELLIOTT,

United States Commissioner, Western District of Wash.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, H. S. Elliott, United States Commissioner, do hereby certify that the search-warrant contained on the reverse side hereof is a true and exact copy of the search-warrant on file [26] in my office and which issued by me on the 12th day of March, 1924.

H. S. ELLIOTT,

U. S. Commissioner, Western District of Washington, Northern Division.

RETURN OF SEARCH-WARRANT.

Returned this 13 day of March, A. D. 1924.
Served, and search made as within directed, upon which search I found 182 gals. of distilled spirits

(D. S.), 178 destroyed, 2 lock and keys, 7 suitcases—
Held as evidence 7 samples of grape wine, 1 pack-
age of papers, 33 boxes of raisins, 1 press, 14
sacks of sugar, 1 raisin grinder, 2 gallon metal
cans.

Destroyed 1300 gals. grape wine, 7-100 gal. bbls.—
12-50 gal. bbls—65-10 gal. kegs—15-5 gal. kegs,
1 gas stove.

H. J. STETSON.

United States of America,
Western District of Washington,
Northern Division.

I, H. S. Elliott, United States Commissioner, do
hereby certify that the above is a true copy of the
return upon a search-warrant issued by me on the
12th day of March, 1924, for the premises de-
scribed as 606-6th Avenue South, Seattle, Washing-
ton, including the 2 doors on each side thereof and
the premises on each side and to the rear thereof.

H. S. ELLIOTT,

United States Commissioner, Western District of
Washington, Northern Division.

March 19th, 1924.

Defendant also introduced in evidence three affi-
davits made in writing, by defendant, K. Massu-
sake, K. Shilama and Kiyochi Muracka, in words
and figures as follows:

AFFIDAVIT OF K. MATSUSAKA.

State of Washington,
County of King,—ss.

K. Matsusaka, being first duly sworn on his oath

[27] deposes and says: That he is a native-born citizen of Japan and a subject of that Government; that he has resided in the United States since the year 1908, and for about four years last past he has been conducting a hotel business at 604½ Sixth Avenue South, in the city of Seattle, King County, State of Washington.

That he has always been a law-abiding resident of this country and has never before March 12th, 1924, been arrested on any charge or in any manner charged with any violation of the laws of the United States, the State of Washington, or the city of Seattle. That he has not kept any intoxicating liquor in his hotel and prevented guests from doing so far as it was within his power and knowingly never permitted anyone to have and possess any such liquor in any part of his said hotel.

That on or about the 12th day of March, 1924, this affiant was in an expressman's room in the basement of the said hotel building and was wearing a so-called sweater-coat in one of the pockets of which, was a written and signed lease which protruded so that the same could easily be seen when an officer, who affiant afterwards learned was a Prohibition Agent, spoke to this affiant and said:

“Give me that paper.”

I said, “No, its mine, a lease.”

The said officer then forcibly took said paper out of my pocket and I said to the officer, “Give me back that paper.” Another officer, then struck me on the mouth with his clenched fist cutting open the lower lip which bled for a long time and did not

heal for a week. Later an officer took me to the Immigration Station in Seattle, where I was kept until the next day when I was released on a bond in cash for Five Hundred Dollars.

I do not speak English very well, but understand nearly everything that is said to me. [28]

The officer did not hit me until after the first officer had the paper in his hand. The second officer became angry when I asked the first officer to give me back the paper. I said I did nothing to provoke him except what I have said. My front teeth protrude and are quite large and the officer hit me so hard that he hurt his hand and cut it open and a man that was there put some peroxide on it.

I understand that the officers found some liquor in two or three rooms, but no liquor was found in any room or place which was under my control. So I maybe understood, will say that the officer who took the paper from me did not strike me, it was the other officer to whom I had not spoken to at all.

K. MATSUSAKA.

Subscribed and sworn to before me March 25th, 1924.

[Notarial Seal]

A. G. McBRIDE,

Notary Public for the State of Washington, Residing at Seattle.

AFFIDAVIT OF K. SHITAMA.

State of Washington,
County of King,—ss.

K. Shitama, who being duly sworn, says:

That he lives at 110 Eighth Avenue South, in the

city of Seattle, King County, State of Washington, is over 21 years of age and was born in Japan and is a subject of that government at this time and has lived in said city for the last past twelve years.

That he is well acquainted with K. Matsusaka, also a Japanese, who conducts a hotel at 6041½ Sixth Avenue South, in the city of Seattle, and that I saw him in the evening of March 12th, 1924, at his hotel. A prohibition agent or officer was there. They were in an expressman's room in [29] the basement of the hotel building. I saw no trouble between the officers and K. Matsusaka, but when I got there, I saw that the officer's hand was hurt and was bleeding and I put some peroxide on the wound. I also saw that Matsusaka's lower lip was badly hurt and was bleeding. I did not see the officer strike him.

K. SHITAMA.

Subscribed and sworn to before me this 25th day of March, 1924.

[Notarial Seal]

A. G. McBRIDE,

Notary Public for the State of Washington, Residing at Seattle.

AFFIDAVIT OF KIYOSHI MURACKA.

State of Washington,
County of King,—ss.

Kiyoshi Muracka, being duly sworn, on oath says:

That he is 34 years of age and lives at 1033 King Street in the city of Seattle, King County, Washington, and that he has known K. Matsusaka for three years.

On the evening of March, 12th, 1924, I saw said K. Matsusaka and two prohibition officers or agents in the basement of the hotel building in which K. Matsusaka conducts a hotel. One of the officers took a paper from K. Matsusaka's outside coat pocket and he asked the officer to give him back his paper, and then the other officer hit K. Matsusaka on the mouth with his fist. I do not know the names of the officers. Matsusaka did not speak to the man that hit him. He did not in any manner resist the officers. The assault was unprovoked. His mouth was hurt and bled and the officer hurt his hand when he hit Matsusaka and it bled considerable. I was about ten feet away. It was not the officer that took the paper from Matsusaka's pocket that hit him. K. Matsusaka is a quiet and inoffensive man. I never knew him to have any trouble with any other man.

KIYOSHI MURACKA.

Sworn to before me this 25th day of March, 1924.

[Notarial Seal]

A. B. McBRIDE,

Notary Public for the State of Washington, Residing at Seattle. [30]

Thereupon, counsel engaged in oral arguments and the said motions were submitted to the Court for its decision, and the Court overruled both of said motions and gave as a reason therefor that the defendant having denied that he was the owner, or in the possession of the premises searched under the search-warrant, the defendant was without right to attack the validity of the search-warrants, their service and the return thereon. To which said rul-

ing counsel for defendant then and there duly accepted.

Thereafter, and on the 18th day of December, 1924, said cause came regularly on for trial on the issues joined by the information filed herein and the plea of not guilty entered by the defendant, the Government was represented by assistant district attorney, J. W. Hoar, and defendant appeared in person and by his attorney A. G. McBride. Twelve men were called and accepted by plaintiff and defendant to serve as jurors in said action. Counsel for the Government made his opening statement and defendant waiving a statement, Walter M. Justi was called as a witness in behalf of the Government, thereupon, counsel for the defendant renewed his motions for the quashing of the search-warrant and return and the suppression of evidence taken thereunder. Counsel proceeded to state his ground why said motion should be granted when the Court asked counsel if the grounds were the same as those presented when the said motions were overruled, to which counsel for defendant stated that in part only and that he desired to call the attention of the Court to the fact that if a defendant was estopped from attacking the validity of a search-warrant, the service thereof and the return, including the affidavit on which the warrant was issued unless he, the defendant claimed the liquor seized, then the defendant could not defend unless he admitted guilt. If defendant must admit ownership or possession in order to free himself of estoppel, he is compelled to admit guilt, because Con-

gress declared in an enactment [31] that from possession, guilt is presumed.

The Court then overruled defendant's motions and reaffirmed its former decision on said motions, to which said ruling, defendant then, there and at the time excepted.

The taking of evidence was then commenced.

Counsel for defendant stated to the Court that there was no dispute as to the amount of liquor found in the two rooms in the southeast corner of the basement of the building, including that found in the stairway, and outside of the legal questions involved, the defendant was only denying that the liquor taken was his, or that he knew anything about it being there and that it belonged to the expressman.

TESTIMONY OF WALTER M. JUSTI, FOR THE GOVERNMENT.

Thereupon, WALTER M. JUSTI, a witness for the Government was duly sworn and in substance testified as follows:

I have been a Government prohibition agent for 3 years and participated in the service of the search-warrant served in this case. Director Whitney and agents Moering and Stetson were assisting, which occurred March 12th, 1924. I know the defendant who conducts a hotel at 604½ Sixth Avenue South. His hotel is on the second and third floors. The heating plant and hot-water appliances are located in the rooms in which we found a large quantity of liquor.

(Testimony of Walter M. Justi.)

The liquor was offered in evidence and defendant objected for the reason that the search-warrant, the affidavit upon which it was issued were void as against defendant and the rooms were not described and defendant's name was not inserted in the warrant and for the reasons also set forth in the petition and motion to suppress the evidence. The Court overruled the objection and defendant then and there excepted. [32]

The liquor was then introduced as evidence and consisted of many suitcases containing one-gallon glass jugs. The liquor was all moonshine and intoxicating, as shown by the evidence.

The witness continued: We found a large quantity of liquor in a well where the stairway or stairs leading up to the first floor of the building had been but the stairway was not in use and had not been used for years, except to hide liquor. The stairway had lead up from the room in which the heating plant is located.

The witness also said the defendant at first admitted he owned all the liquor but afterwards denied it. Also, that when defendant first appeared when these rooms were entered, the defendant had a paper written on a typewriter and signed by two parties which he showed to Director Whitney. The paper was a lease from defendant to another man. The defendant ran around there in a threatening manner and I hit him with my fist. There was a big box in the room that I had seen up in the hotel and that had 7 gallons of liquor in it. One of the

(Testimony of Walter M. Justi.)

keys we took from defendant unlocked the box. The defendant kept baggage in those rooms. There was also a clothes line on which there was some family washing belonging to the defendant. We found nothing but moonshine liquor there. We could smell it from an adjoining room. There were 7 suitcases of liquor. Defendant said he only had access to the room where exhibits were. Witness denied that any of the prohibition officers broke open or destroyed any barrels in rooms 606.

TESTIMONY OF W. N. WHITNEY, FOR THE GOVERNMENT.

W. N. WHITNEY, assistant prohibition director who being duly sworn testified in substance as follows:

Agents Stetson, Moering, myself and Justi went [33] to the basement to search 606, 6th Avenue South, 606 was occupied by the Cascade Soda Company. There were two other rooms we entered, boiler and heating plant in one. Stairway in that room, but stairs torn out. Used a ladder. Defendant said it was his basement and had only key—no one else. Also said storeroom was his. Old things, suitcases and junk in the room. There was a box there. Defendant afterwards denied his statements and said “Oh?” and “Ah?” Defendant when he came down from the hotel above handed me a written and signed lease and said he had leased the two rooms to an expressman. I told him to go and find the expressman and if he found him I would not

(Testimony of W. N. Whitney.)

arrest him. He went away and when he returned he said he could not find him and then I arrested the defendant. When he first handed me the lease I read it and gave it back to him, but afterwards I took from him a bunch of keys. I also saw the big box in one of the rooms, Agent Justi spoke of in his evidence. I had seen the box previously in the hotel. The box had liquor in it and defendant had a key that unlocked it. I did not try to find the expressman, I got the right man, the director said.

Officer H. B. Moering, who qualified as a witness and said he participated in the raid. That defendant made a rush at him. The defendant had a key to the big box. Told about finding liquor.

Copies of the lease and a drawing of the basement were introduced in evidence and are hereto attached and made a part hereof. They are designated as Defendant's Exhibits "A2" and "A1."

At the close of the plaintiff's evidence, defendant moved the Court for a directed verdict, in favor of defendant upon all the grounds heretofore urged for a suppression of evidence and quashing of the search-warrant, and that the evidence was insufficient, which said motion the Court overruled, and defendant excepted. [34]

TESTIMONY OF G. NCHIDA, FOR THE
DEFENDANT.

G. NCHIDA, a witness for the defendant, being duly sworn, testified in the English language in substance as follows:

I am a Japanese, 38 years of age, married and have two children.

That he was well acquainted with the defendant and had known him for about four years. That during said time he conducted the hotel and apartment house called the "Pacific Hotel," corner of Weller Street and Sixth Avenue South, in Seattle. That the witness and his family lived in defendant's hotel for about three years. Said hotel is conducted in the two upper floors of said hotel building. That the lower floor is a basement. That defendant had two baggage-rooms, one on his first floor and one on the second. That he never used any part of the basement as a baggage-room. That defendant was a good man and bore a good reputation among his friends and acquaintances. That he was not a drinking man and never allowed any person in his hotel to have liquor if he knew it. That during the three years that the witness lived in defendant's hotel, two bootleggers were discovered and defendant made them leave the hotel as soon as he found out that they were bootleggers. There are more than sixty rooms in defendant's hotel and there were a great many families living there. The defendant is also a Japanese and

(Testimony of G. Nchida.)

does not speak or understand the English language very well and the witness acted as interpreter for defendant in his business when he was at his home. Before the defendant was arrested in this case, I saw an expressman carry some empty bottles into the basement of the hotel and I also saw the expressman carry a very heavy suitcase in and out of the basement. The expressman had rented the boiler and hot-water plant and a small room in front of said boiler-room. I never knew of [35] defendant using said basement rooms except that he had the right to go into said rooms to keep a fire to heat his hotel and to provide hot water.

TESTIMONY OF REV. K. EMURA, FOR THE DEFENDANT.

Rev. K. EMURA, a witness for defendant, was duly sworn and testified in substance as follows:

I am a minister and for some time have been the pastor of the Japanese Presbyterian Church, a branch of the First Presbyterian Church, 922 9th Avenue South, and the defendant attends my church. He has come to my church for several years and expects to become a member. Applicants for membership must wait for about one year. I know the defendant real well and know a great many Japanese. The defendant is considered a good man by those who are acquainted with him.

TESTIMONY OF K. MASSUSAKE, IN HIS
OWN BEHALF.

The defendant, K. MASSUSAKE, being first duly sworn testified in his own behalf. Taking his evidence was started in the English language, but was so unsatisfactory that the Court ordered that an interpreter be secured. His evidence follows:

I am the defendant. I am a native of Japan. I have conducted a hotel and apartment house at Weller Street and Sixth Avenue South, in Seattle for four years last past, and it is called the Pacific Hotel. I have the second and third floors of the building, more than 60 rooms in all. I also have a small room and boiler-room in the basement. I rented those rooms in the basement to an expressman and I reserved the right to go into the boiler-room to keep a fire for heat and warm water. These rooms are in the southeast corner of the building. The balance of the basement was used by some people that made soft drinks. The number of the rooms occupied by said soft-drink men was 606 Sixth Avenue South. The boiler-room and small room had no number. I have [36] never been arrested before in all my life. The police found 2 bootleggers in my hotel during the four years I was there, but they did not arrest me. I made the bootleggers go away from my hotel. The number of my hotel is 604½ Sixth Avenue South. I don't use liquor and never

(Testimony of K. Massusake.)

let anyone stay at my hotel that kept it if I knew it.

I remember the time I was arrested; I went down to the basement where the officers were. I heard the officers say that I was to have said the liquor in the two rooms and in the stairway was mine, but that is not true. I told the officers I leased the rooms and showed one of the officers (Whitney) the lease and he read it and I denied owning or having anything to do with the liquor. I told them the expressman owned the liquor and the officer (Whitney) told me if I would go and find the expressman they would not arrest me and I and my wife went and tried to find the expressman, but we could not find him, and then they arrested me. When I showed the officer the lease, he read it and gave the paper back to me, but afterwards he took the paper from me. I asked him to give me back the paper and another officer hit me on the mouth with his fist. There was a big box in the basement that was mine and used to be up stairs. The officer said one of my keys unlocked the box. I don't know. I had no liquor in the basement and knew nothing about it. The officer took the paper from me and my keys too. He did not give me any receipt or inventory. The officers did not try to find the expressman and they never came to me and ask me to help find him. He was in Seattle a long time.

The witness was asked if he saw any of the officers destroy any barrels and other things such as

(Testimony of K. Massusake.)

kegs, bottles or jugs. His answer was: I saw the officers destroy and pound to [37] pieces some barrels in the rooms numbered 606, for which I was told they had a search-warrant. I helped to destroy the barrels. I used an ax. The officers made me help them. I was under arrest at the time.

TESTIMONY OF MR. PARSHAL, FOR DEFENDANT.

Mr. PARSHAL, a witness on behalf of the defendant after being duly sworn as a witness, testified as follows:

I am the secretary of the Squire Investment Company, with offices in the Empire Building. It is a corporation. I perform many of the duties of a manager. Our corporation owns the building in which defendant conducts a hotel called the Pacific Hotel, at 604½ Sixth Avenue South, Seattle. There is a boiler-room and a small room in the southeast corner of the basement. The boiler-room has a heating and hot-water appliance and is used in connection with the hotel. The west half and the north half of the east half of the basement was occupied by the Cascade Soda Company. Its rooms were numbered 606 Sixth Avenue South. The boiler-room and other little room had no number. I was down to see the building the day after the officers raided the basement of our building. Someone had destroyed a number of barrels and other containers. There was a

(Testimony of Mr. Parshal.)

very bad odor in the basement caused by the smashing of the barrels and the contents being left on the concrete floor. The defendant has been our tenant for the second and third floor of said building and the boiler-room for about four years. I go down to see the place quite often and keep myself informed with regard to the illegal use of the place. We have always found the defendant a good man and a good tenant. I believe he bears a good reputation among those who know him. We have never had any complaints. Once or perhaps two times, I heard [38] bootleggers were discovered in the hotel, but no complaint was ever made by the prohibition officers and the defendant was not arrested, or blamed for the presence of these law violators.

TESTIMONY OF SERGEANT GRIFFITH, FOR THE GOVERNMENT.

Sergeant GRIFFITH, being duly sworn as a witness, testified as follows in substance:

I am a sergeant of police in which the building occupied by defendant as a hotel is located. I have known the defendant and his place of business for three years or more. Before I became a sergeant I was a patrolman in that district. I know the general reputation of defendant's hotel and his reputation too. We have different ways of getting and knowing the reputation of a place. There are certain occurrences and signs that give

(Testimony of Sergeant Griffith.)

officers information on that subject. Where drink is sold, drinking men will gather, and will be seen going in and out. I have had occasion to know the reputation of all the hotels, rooming-houses and soft-drink parlors in my district for years. I don't know of a cleaner place in that district than the hotel conducted by defendant at 604 1/2 Sixth Avenue South. Not only as to liquor and bootlegging, but we never took a woman out of his hotel. He has also always rendered the police department any service he could give us when called on. His reputation and his hotel have the very highest and best reputation in the police department.

The defendant asked the Court to instruct the jury as follows:

Under the rule of *falsus in uno, falsus in omnibus*, and also to the effect that the evidence of the prohibition officers in which they declared the defendant practically admitted his guilt, should be taken and considered with extreme caution for the reason that defendant not understanding and speaking the English language well might have been misunderstood. [39]

The Court refused to instruct as requested. Counsel for defendant preserved an exception to said ruling.

AND NOW, in furtherance of justice, and that right may be done, the defendant, K. Massusake, tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause,

and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record of this case.

A. G. McBRIDE,
ADAM BEELER,
Attorneys for Defendant.

Service of a copy hereof hereby acknowledged this 9th day of March, 1925.

J. W. HOAR,
United States Attorney.

The foregoing bill of exceptions is hereby settled. There was evidence for the prosecution not herein contained but I do not now remember any that appears material upon the writ of error. There was no stenographic report of the proceedings and it has been five months since the trial.

Certified this 21st day of May, 1925.

EDWARD E. CUSHMAN,
Judge. [40]

DEFENDANT'S EXHIBIT "A-2."

AGREEMENT.

This agreement is entered into contract between K. Matsusaka, the party of the first part and —, the party of the second part, on this Thirty-first day of December, A. D. 1923, to wit:

1. The party of the second part is hereby granted by the party of the first part to occupy and use a portion of a storage room in a basement in a certain hotel known as the Pacific Hotel, located at 604½

Six Avenue South, in the city of Seattle, County of King, State of Washington, for the consideration of payment of rent in the amount of TEN (\$10.00) DOLLARS per month.

2. The party of the first part is not leased the said premises of the aforesaid Pacific Hotel from the owner, but the party of the first part is rented on the month basis.

3. The party of the second part is understood and promised to the party of the first part to vacate and surrender the aforesaid storage-room to the party of the first part in such event as the party of the first part vacate and surrender the aforesaid Pacific Hotel to its owner.

4. Rents all have to be paid on or before the first day of each and every month. The receipt of first payment of TEN (\$10.00) DOLLARS for the month of January, 1924, A. D.; is hereby acknowledged by the party of the first part.

5. It is understood and promised that the party of the second part shall used aforesaid storage-room on a *bona fide* and legal purpose, and this contract shall have to be made void and nil in case of any illegal conduct of the said party of the second part. Any portion or portions of the unworked part of rent paid in advance shall have to be confiscated as fine to the party of the first part in such event of aforesaid illegal conduct and its subsequent cancellation of this contract.

The party of the first part is in no way responsible for the conducts of the said party of the second part.

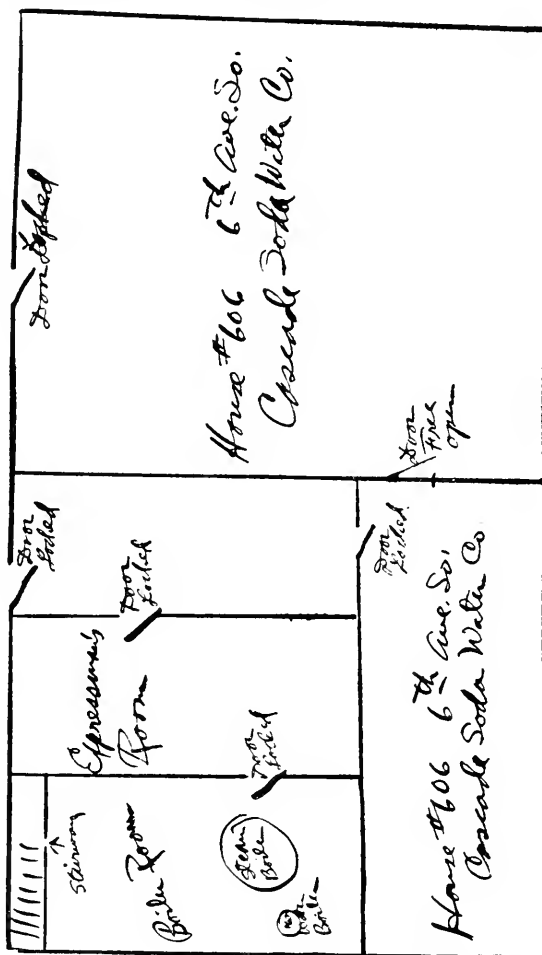
[Signed] T. TENCHI,

Second part.

[Signed] K. MATSUSAKA,

First part. [41]

DEFENDANT'S EXHIBIT "A-1."



[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Mar. 9, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 21, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [42]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

ORDER EXTENDING TIME THIRTY DAYS
TO FILE RECORD AND DOCKET CAUSE.

This matter coming regularly on for hearing on the application of the defendant, K. Massusake, for an order extending the time in which to file and docket the record in the Circuit Court in the above-entitled cause, the Court being fully advised in the premises and good cause being shown;

IT IS HEREBY ORDERED that the time within which to file and docket the record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and

hereby is, extended thirty (30) days from the date hereof.

Done in open court this 21st day of May, 1925.

EDWARD E. CUSHMAN,

Judge.

Service of the foregoing order by receipt of a true copy thereof, is hereby acknowledged this 21 day of May, 1925.

J. W. HOAR,

United States Attorney.

O. K.—J. W. HOAR.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 21, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [43]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. MASSUSAKE,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record on appeal to the Circuit Court of Appeals of the Ninth

Circuit in the above-entitled cause, and include therein the following:

1. Information.
2. Arraignment of defendant.
3. Plea.
4. Record of trial and impaneling jury.
5. Verdict.
6. Motion for new trial.
7. Hearing of motion for new trial.
8. Judgment and sentence of defendant.
9. Petition for writ of error.
10. Assignments of error.
11. Order allowing writ of error.
12. Supersedeas.
13. Citation.
14. Writ of error.
15. Order of January 6, 1925, extending time to serve and file bill of exceptions.
16. Order of March 2, 1925, extending time to serve and file bill of exceptions. [44]
17. Bill of exceptions.
18. Order settling bill of exceptions.
19. Order of May 21, 1925, extending time to file and docket in Circuit Court record on appeal.
20. Defendant's praecipe.

A. G. McBRIDE,
ADAM BEELER,
Attorneys for Defendant.

We waive the provisions of the act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals

for printing as provided under Rule 105 of this Court.

A. G. McBRIDE,
ADAM BEELER,

Attorneys for Plaintiff in Error.

Received copy of praecipe May 21, 1925.

J. W. HOAR,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 21, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [45]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATUSAKE,
Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of

record, consisting of pages numbered from 1 to 45 inclusive, is a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [46]

Clerk's fees (Sec. 828 R. S. U. S.) for making	
record, certificate or return, 109 folios	
at 15c	\$16.35
Certificate of Clerk to transcript of record,	
4 folios at 15¢, .....	.60
Seal to said certificate .....	.20
	<hr/>
Total	\$17.15
	<hr/>

I hereby certify that the above cost for preparing and certifying record, amounting to \$17.15 has been paid to me by the attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 12th day of June, 1925.

[Seal] ED. M. LAKIN,
Clerk U. S. District Court Western District of
Washington.

By S. M. H. Cook,
Deputy. [47]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATSUSAKE,
Defendant.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America,
to the Honorable Judges of the District Court
of the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is

in said District Court, before the Honorable Jeremiah Neterer, between K. Matsusake, the plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf,

DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at said city of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 6th day of January, 1925, and the year of the Independence of the United States one hundred and forty seventh.

ED M. LAKIN,
Clerk of the District Court of the United States
for the Western District of Washington.

By S. M. H. Cook,
Deputy. [48]

Acceptance of service of within writ of error,
acknowledged this 6th day of January, 1925.

THOS. P. REVELLE,
Attorney for Plaintiff. [49]

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Jan. 6, 1925. Ed. M. Lakin, Clerk,
By S. M. H. Cook, Deputy.

In the United States District Court for the Western
District of Washington, Northern Division.

No. 8652.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

K. MATSUSAKE,
Defendant.

CITATION ON WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America,
to the United States of America, and to
THOS. P. REVELLE, United States Attorney
for the Western District of Washington,
Northern Division, GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court
of Appeals for the Ninth Circuit at San Francisco,
in the State of California, within thirty days from

the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said K. Matsusake is the plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 6th day of January, A. D. 1925.

EDWARD E. CUSHMAN,
United States District Judge.

Attest: ED. M. LAKIN,
Clerk of the District Court of the United States
for the Western District of Washington.

By S. M. H. Cook,
Deputy.

Service of the within citation and receipt of a copy thereof is hereby admitted this 6th day of January, 1925.

THOS. P. REVELLE,
Attorney for Plaintiff. [50]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy.

[Endorsed]: No. 4665. United States Circuit Court of Appeals for the Ninth Circuit. K. Matusake, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed Aug. 17, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

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**United States
Circuit Court of Appeals
For the Ninth Circuit**

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

**OPENING BRIEF
FOR PLAINTIFF IN ERROR**

ADAM BEELER,

Attorney for Plaintiff in Error.

1808 L. C. Smith Bldg.,
Seattle, Wash.

No. 4665.

United States
Circuit Court of Appeals
For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

OPENING BRIEF
FOR PLAINTIFF IN ERROR

STATEMENT.

The Plaintiff in Error was charged with the violation of the National Prohibition Laws by an information which contained two counts. The jury trial ended with a verdict of guilty on both counts.

A motion for a new trial was denied and the sentence imposed was three hundred dollars (\$300.00) fine on the first count and three months imprisonment in a county jail on the second, and he now brings the record to this court for review.

Appellant at the time of the trial had conducted a hotel in the two upper floors of a three story brick building for four years at 604½ Sixth Avenue South in the City of Seattle. There is and was a full basement under the building with concrete walls. (See diagram on page 52 of the record.) The room in the front of the basement and the room on the north on the east end of the basement were occupied by the Cascade Soda Water Company. These two rooms were numbered 606 Sixth Avenue South, and the same numbers given in the affidavit for a search warrant and the search warrant.

In the southeast corner of the basement were three small rooms, the one on the east end being the boiler room that furnished hot water for the hotel conducted by appellant. The appellant leased these rooms to an express-man with the reserved privilege of ingress to keep the boiler hot. The express-man kept the doors locked, but appellant had a key to gain admittance when the hot-water boiler needed attention.

The search warrant was dated March 12th, 1924, and on the following day the prohibition officers raided the two rooms numbered 606 Sixth Avenue South, and destroyed a number of barrels of mash that covered the concrete floor. The appellant was given an axe and compelled to assist the officers in their mission of destruction.

When the raiders arrived the appellant and his wife went down to the basement and appellant informed one of the officers, Mr. Whitney, that he was not interested in the two small rooms next to the boiler room and that he leased them to an express-man and showed him a copy of the lease. The officer told appellant that if he would go and get the express-man, the appellant would not be arrested. The appellant and his wife then left and made a search and inquiry for the express-man in the Japanese quarters of the City, but on their return stated to the officer that they could not find him, and the appellant was forthwith arrested, and he was searched and his papers, keys and other effects were taken from him. The appellant's name was not in the warrant and the search was without any authority whatever. The appellant asked for the return of the lease, which by the way had been returned to him, but when searched it was forcibly

taken from him, and when he asked for it's return, a second officer, not Mr. Whitney who searched him, hit him on the mouth and the officer cut his hand on appellant's protruding teeth. (See affidavit pages 33-35-36-27 of the record.)

The prohibition officers never made any attempt to arrest the expressman who owned the liquor. When asked on the witness stand why the officer made no attempt to arrest the expressman, his reply was, "we got the right man" in the presence of the jury.

ASSIGNMENTS OF ERROR.

I.

That the defendant prior to the trial of said cause, filed two motions, one of which was entitled "Motion to Suppress Evidence and Dismiss the Action" and the other was entitled "Motion and Affidavit to Quash Warrant" which said two motions were heard and considered together and were both denied by the court, to which ruling the defendant then and there excepted for the reason and upon the ground that the evidence was illegally and unlawfully seized and obtained, and the defendant's person and premises were illegally and unlawfully seized and obtained, and the defendant's

person and premises were illegally and unlawfully searched and that the search and seizure was made without any valid search warrant, but was made upon the propoerted search warrant which was in law an invalid search warrant in that the premises searched were not properly described, and further that the search warrant itself failed to state any probable cause for the issuance of the same, and for the further reason and upon the ground that a certain paper taken from the person of the defendant was taken in violation of the Constitution of the United States and particularly in violation of the fourth and fifth Amendments to the Constitution of the United States, which exceptions were by the court allowed and now the defendant assigns as error the ruling of the court upon the said motions.

II.

That during the course and progress of the trial of the defendant herein, the defendant made due and timely exceptions to the introduction of the evidence on the grounds and for the reason that said evidence and also the testimony relating thereto was obtained unlawfully and by virtue of an illegal and void search warrant, which objections were by

the court overruled, and to which ruling exceptions were by the court allowed and now the defendant assigns as error the ruling of the court upon such exceptions.

III.

Thereafter, and within the time limited by law, and the orders and rules of the court, the defendant moved the court for an order granting to him a new trial, which motion was denied by the court, to which ruling of the court the defendant then and there duly excepted and the exception was by the court allowed; and now the defendant assigns as Error the ruling of the court upon the said motion.

MOTIONS TO QUASH AND SUPPRESS.

The appellant moved the court to quash the search warrant and suppress the evidence obtained by means of a search of the body of plaintiff in error. (Record pages 22 to 27 inclusive.)

The search warrant is what is known as a "General Search Warrant," the elements of which are so dangerous to human liberty and the rights to property, that although outlawed in England and America, they are still in use and held valid by some jury trial courts. A brief review of the life of this pernicious writ will not be a waste of time and space.

In 1765, Lord Camden, then Lord Chief Justice of the highest court in England, wrote the opinion in the great case of *Entick vs. Carrington*, reported in Vol. 19 State Trials, page 1063. This decision fully stated what the English law then was and what it had been in the past, and especially denounced the so-called "General Warrants" which were in common use in England up to the time of the writing of the opinion. It was, therefore, an exposition of common law and as such, was the law in America where English rule prevailed. This decision was called the "Land Mark of English Liberty."

With only slight exceptions the declared law of *Entick vs. Carrington* is the same as the Federal Laws of the United States at this time. The most notable exception is in the statement of probable cause for the issuance of the search warrant. A bare bold statement under oath is sufficient in England and was sufficient here until 1791, when the Fourth and Fifth Amendments were adopted. Under the English laws, papers and other property must be described and the fourth Amendment only reiterates what always was the British Law.

Private papers were immune in England the same as they are in the United States.

The American people were not satisfied with the English law that only required a bare bald declaration as a basis for the issuing of a search warrant and no doubt Congress had the decision in *Entick vs. Carrington* in mind when the Fourth and Fifth Amendments were sent to the States for ratification. Then, one year after Lord Camden's great decision was made public, the House of Commons gave its approval of the great Judge's exposition of the Common Law and condemnation of General Warrants.

That was the cause that brought that famous case into the English courts, and we are safe in say-

ing that by the Fourth and Fifth Amendments, Congress also intended to follow the English House of Commons and give those pernicious General Warrants a fatal blow, and forever outlaw them.

But General Warrants were not eradicated by the Fourth and Fifth Amendments and the reports of the appellate tribunals show many cases were being decided involving their constitutionality. The Congress stood patiently by for 126 years from 1791, until June 15th, 1917, when the Espionage Law was enacted, which included the present Search and Seizure Laws. No doubt the Search and Seizure Law is one of the most polished and most perfect laws that ever was enacted by a legislative body. It has had its trial for about eight years and it has in part failed to accomplish its purpose. It was expected that it would soon announce a requiem for that great enemy of human liberty—General Warrants—but in the parlance of Main Street,—Nothing Doing.

Vol. 40 U. S. Stat. page 230.

The search and seizure law, proper, is composed of 23 Sections and some 18 Sections were primarily enacted to preserve and perpetuate forever the rights of the American people to their

liberties, their homes and their property, and especially against unlawful searches and seizures, but with sorrow it may be said that of these 18 preservative Sections, from 10 to 14 have been annulled and made inoperative by the jury trial courts in this Great Nation.

What is the true test of a valid Warrant?

Is it what will an officer do, or what can he do, or what is he commanded to do?

If a warrant commands an officer to do and perform an unlawful act, is it void or voidable? That is, if he refrains from doing the unlawful act, is the warrant valid, and invalid if he does the unlawful act? Suppose a man is commanded to arrest and kill a man who is wanted on a criminal charge, and he arrests the man and brings him before the court—is that warrant void?

Turn to page 32 of the record and we find a part of the Search Warrant as follows:

* * * “and to search the person of said above named persons and from him or her, or from said premises seize any or all of the said property, documents, papers and materials”
* * * That includes private papers.

The above quotation makes the Warrant in question a “General Warrant.”

The Fourth Amendment and the Act of June 15th, 1917, had two purposes in view—to make more certain and definite the statements contained in the application for a search warrant and to abolish the use of General Warrants.

A general search Warrant in effect says to the officer “Go search your man, or his house, or both, bring to the court all the documents and papers you can find.”

A warrant that contains the legal elements required by the Fourth Amendment and the Search and Seizure Laws of 1917, says to the officer “Go search your man, or his house or both, for property, or papers that are *particularly described* in the application for a warrant, and in the warrant.”

In England and America private papers are held sacred. In England by the common-law, and in the United States by the Fifth Amendment, as well as the common law of England. The Fifth Amendment was taken from the English common Law, and you will find it in Lord Camden’s great decision. The appellate courts of both Nations followed unbroken lines. An officer dare not touch a private paper or personal effects to be used as evidence under a warrant. But that is just what officer Whitney did in this case under a General

Warrant, and General Warrants have been in universal use in Seattle ever since the Volstead Law became operative, and in this case a General Warrant was held valid.

Considering the many and persistent efforts that have been made in England and the United States to crush and stifle these unjust, dangerous and pernicious General Warrants, it seems incomprehensible that after the lapse of more than a century from the time this great legal battle was inaugurated in the United States against them, there could be found one single court that would encourage and permit their use. The *Gouled*, the *Boyd*, the *Weeks* and numerous other decisions of the Supreme Court of the United States cry out in denunciation of violations of constitutional rights, and we know of no appellate court decision that has ever abetted the use of these General Warrants, because they are condemned by our Sacred Constitution, the Laws of Congress and the conscience of man. They are void, absolutely void.

In *Renigar vs. United States*, 172 Fed. 655, Par. 2, Justice Bradley is quoted as follows:

“Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal mode of Procedure
* * * It is the duty of all courts to be watchful

for constitutional rights of the citizen, and against any stealthy encroachments.

“Obsta principils”—*“Resist the first beginning.”*

See the following citations:

Gouled vs. U. S., 255 U. S. Rep. 305.

Maresea Case, 266 Fed. 725.

U. S. vs. Boyd, 116 U. S. Rep. 627.

U. S. vs. Weeks, 232 U. S. Rep. 383-391.

U. S. vs. Silverthorn, 251 U. S. Rep. 385.

There are other objections to the Search Warrant. The warrant names the owners of the Cascade Soda Water Company and correctly describes the place as rooms No. 606.

On page 52 of the record a map or diagram shows the location of rooms 606 and 606 was raided by the prohibition officers. There was some distilling going on there and barrels with mash and other receptacles were destroyed, notwithstanding, destruction of seized property is unlawful under the Search and Seizure Laws.

It may have been intended to describe the boiler room and the two other rooms on the west, but if such was the intention it was a flat failure. The description of the place reminds one of Bloke's Item, concerning which Mark Twain said: “Con-

sidering the great circumstantiality of detail, it don't contain as much information as it ought."

On page 28 of the record in the last line commencing at the word "including the two doors on each side thereof and the premises on each side of the rear thereof, and on the premises used, operated and occupied in connection therewith and under control and occupancy of said *above parties*." But defendant was not one of the above parties.

The affidavit for a search warrant and the search warrant were both written to cover rooms 606. The proprietors of 606 were named and the stenographer who wrote the papers evidently thought that the boiler room and the two other rooms were occupied by the owners of the business in 606, because the Warrant, Record page 31, reads at the end of the first paragraph, "operated and occupied in connection therewith and under the control and jurisdiction of said 'above parties'." The above parties named are K. Hara, R. T. Oka and K. Tokyo, proprietors and employees of 606 and for the reason that they were mistaken as to the occupancy of the expressman's rooms and the boiler room, the name of the expressman and the Plaintiff in Error, K. Matusake, were omitted. But mistake or no mistake, a search warrant must name the per-

son, or describe him. A fictitious name is insufficient.

(I might add for the information of the court that the diagram on page 52 should be read that the top of the map faces east, to the right north, and to the left, south.)

Another objection to the validity of the search warrant and an objection which we believe renders the search warrant absolutely invalid and therefore, the evidence obtained thereunder, incompetent and inadmissible is the absence of any statement whatsoever in the search warrant by the Commissioner who issued the same "stating the direct grounds or probable cause for its issue."

The search warrant was issued under the Search Warrant Statutes being Sec. 6 of the Act of June 15th, 1917, which reads as follows:

"Issue-Contents—If the judge or commissioner is thereupon satisfied, of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil, officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, *stating the particular grounds or probable cause for its issue* and the names of the persons whose affidavits have been taken in sup-

port thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or Commissioner.”

It might be safely assumed that when Congress used the underscored language in the above quoted Statute, that said language had some meaning, otherwise, it would not have been contained therein, and it seems reasonable that the meaning which should be attached to said language is nothing more or less than what said language says, that is, that in issuing a certain warrant and as part of the contents thereof, the Commissioner *must* state the direct grounds or probable cause for its issue. Now referring to the affidavit upon which said search warrant was issued. It can be seen that the alleged probable cause or direct grounds upon which said search warrant was issued was that part of said affidavit which reads:

“and that in addition thereto affiant on said 11th day of March, 1924, and on previous occasions detected the odor of intoxicating liquor on said premises * * * ”

Because the agent could smell liquor from afar, is not sufficient excuse for annulling and setting aside Secs. 3, 4, 5 and 6 of the Act of Congress of June 15th, 1917, the so-called Search and Seizure Act, which requires supporting affidavits or depo-

sitions, and the names to be written of the persons making this corroborating proof into the Search Warrant.

The Government Agent and the Commissioner who issued the warrant, supported by the trial court, set aside, and for the purposes of this case, absolutely annulled four sections of an Act of Congress and the Fourth Amendment to the United States Constitution, on the theory that if an agent could detect the odor of liquor, it did away with the requirements that the allegation of probable cause be supported before a Search Warrant can be issued.

The matter contained in the affidavit and application for search warrant, immediately preceding the portion quoted hereinabove, as under previous decisions of the Federal Courts of this Circuit Court of Appeals as decided in the case of *Lochnane vs. U. S.* referred to in 2 Fed. (2nd) 427, has no statement whatsoever of probable cause, but is simply a conclusion of law by the affiant, and that being true its incorporation in the search warrant is not a statement of probable cause, and without the search warrant itself containing a statement by the Commissioner of the probable cause, upon which it was issued, then under Section 10496 $\frac{1}{4}$ F the search warrant is absolutely void and that Section of the Statute needs to have something stricken out of it.

The probable cause, if any, is alleged, is English law, and not American.

The affidavit for a warrant was verified by Mr. Whitney and he says that on the 11th day of March, 1924, and on previous occasions he detected the odor of intoxicating liquor on said premises, that is room 606, not the boiler or expressman's room.

The smelling ability of the affiant will not be challenged nor denied, but we do not believe that inhaling the not disagreeable odor of an intoxicating beverage will supply the failure of the officer to have his affidavits for a warrant supported by witnesses, and their names in the warrant as the Search and Seizure Law directs, and commands, in Sections 4, 5 and 6 of said Search and Seizure Act.

The Secretary of the Interior seems to have taken our Constitution and the acts of Congress seriously for in his revised rules and regulations which were revised in March, 1924, in Section 2220, page 198, says:

“The constitutional and Statutory limitations upon searches and seizures must be scrupulously observed by investigating officers. Where a search warrant is required for such entry and search, no attempts should be made to enter any other premises protected by such limitations nor to take any property therefrom.”

In this cause a limitation, both constitutional and statutory, existed and both required that the name of the plaintiff in error should appear in the affidavit and the search warrant and also that the place to be searched should be particularly described.

Section 12 of the Search and Seizure Law requires that when any property is taken, a copy of the warrant together with a receipt for the property taken by him, be given to the party named or in whose possession it was found, etc.

The return of the officer fails to state a compliance with the act of Congress in that respect. The object of requiring a receipt to be given is apparent, and should be given to the person accused. (See pages 32-33 of Record.)

Section 13 of the Search and Seizure Act requires the officer to verify his return and provides a form to be used. This was omitted and presumably intentionally, because the plaintiff's person was searched and his personal effects and private papers were forcibly taken from him under a warrant that did not have his name, and the evidence thus secured by the unlawful seizure was used, and largely contributed to his conviction, and when the defendant asked for the return of his property so

unlawfully taken, the prohibition officer hit him in the face with his fist and injured his hand so that first aid had to be administered to the officer's hand to stop the flow of blood.

See affidavit of K. Shitama, Record page 35-36.

See affidavit of Kiyoshi Muracks, Record page 36-37.

See affidavit of M. Matsusaka, Record page 33-34-35.

This was a violation of Section 21 of the Search and Seizure Law which reads:

“Sec. 21. An officer who is executing a search warrant wilfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than \$1,000 or imprisoned not more than one year.”

which violation rendered officer Justi liable to criminal prosecution and punishment for his unlawful act.

A false return was made in this case and when the attention of the officers was called to it at the hearing of the motions to quash the warrant and to suppress the evidence, no request was made to supply a truthful return.

An officer is bound by his return.

MISDEMEANOR OR FELONY.

Plaintiff in Error claims that the search warrant is void because he was charged with the commission of a misdemeanor and that under the Federal Prohibition Laws, it can only be issued in felony cases. The only sections of the Volstead Act authorizing searches and seizures for violation of the Federal Prohibition Laws and the only sections under which a Search Warrant can be issued are those herein quoted being Section 25, Title 2 of the Volstead Act and the latter part of Section 2, Title 2 of the same Act.

Section 25, Title 2 of the Volstead Act in part says:

“A search Warrant may issue as provided in Title XI of Public Law numbered 24 of the Sixty-Fifth Congress approved June 15, 1917,” known as the Search and Seizure Act.”

The latter part of Section 2, Title 2 of the Volstead Act is as follows:

“Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said Section 1014 are authorized to issue Search Warrants under the LIMITATIONS provided in Title XI of the act approved June 15, 1917,” which is the Search and Seizure Act. (Capitals are ours.)

Section 2 of the Search and Seizure Act reads:

“A search warrant can only be issued, when the property was used as a means of committing a FELONY; in which case it may be taken on the warrant from any house or other place in which it is concealed or from the possession of the person by whom it was used in the commission of the offense, or from the person in whose possession it may be.” (Capitals are ours.)

Boyd vs. U. S., 116 U. S. Rep. 626, is as follows:

“It has been the law of the Federal Courts that advantage to the government is not an adequate reason for overlooking a disregard by its officers of the constitutional rights of an individual.”

Under the word “limitations” quoted in the preceding Section, it certainly appears that a Search Warrant in prohibition cases can only be in felony causes.

Section 1 refers to stolen and embezzled property and Section 3 refers to foreign affairs, and only the sections quoted are applicable to the enforcement of the Volstead Act. Section 2 only, applies to prohibition cases.

This Section need frighten no one. It is borrowed from the common law. The English always took the Search and Seizure laws very seriously and the use of that legal weapon was not permitted in misdemeanor cases.

Mr. Volstead thought he had a perfect law, but he slipped when he put his Prohibition Law under the guidance of the Espionage Act.

With this law staring one in the face, I ask by what authority do officers take, or the court admit in evidence, property used as a means of committing any other offense than a felony?

By what authority of law, can a court or Commissioner issue a search warrant to take property used as a means of committing a misdemeanor, and I might ask, is a warrant good unless it uses the word, "felony"?

In the leading, and much quoted *Gouled* case, 255 U. S. Supreme Court Reports, page 296, the Search Warrant was given in part in the opinion written by Justice Clarke, and the warrant properly limited the search to property *used as a means to commit a felony*, and other mention is made of that law in the same reported case.

SUFFICIENCY OF EVIDENCE.

The defendant claimed at the trial, and at all times that he was not the owner of the seized liquor in the three unnumbered rooms and was not interest-

ed in it in any manner and did not know it was there. It was hid in locked boxes and suit cases and a part was stored in a wall in an abandoned stairway. The defendant was compelled to pass through these rooms for the purpose of firing the boiler that supplied hot water and heat for his hotel. It is common knowledge that dealers in contraband liquor resort to all manner of devices to hide the same and the defendant could pass through the rooms several times daily and not discover the liquor.

To guard against suspicion and possible arrest as well as to preserve his good reputation, the defendant and his wife went down to the basement and showed officer Whitney the lease and told him of the bootlegger who was the owner of the liquor. (Record pages 50-51-2.)

Officer Justi said in his evidence that defendant admitted he owned all the liquor and afterwards denied it. It is with difficulty that defendant speaks English and after a trial the court directed that an interpreter be sworn, so it is possible that officers Justi and Whitney may not have correctly understood defendant. That is a charitable view, however, for this reason, that these two witnesses, Justi and Whitney, have the habit of testifying to con-

fessions in all their liquor cases and the court records will show such to be the case.

These two officers also testified that the defendant kept baggage in their rooms. How did they know that? The testimony of Nehida (Record page 43) who acted as interpreter and who had lived in the hotel about three years said the defendant had two baggage rooms in his hotel, one on the second floor and one on the third floor.

The testimony of Justi and Whitney doesn't fit the truth but it isn't a misfit to falsehood for this reason: With baggage rooms on the second and third floors, the arrangement would be most convenient and why should defendant carry the baggage from the second and third floors to the sidewalk on the first floor, then turn at the southwest corner of the building and carry the baggage two-thirds of the length of a long building to the basement door, when he had 60 rooms in his hotel and his office would supply one baggage room and only take out one room on the third floor out of the 60, for baggage.

Such testimony is a misfit—it doesn't fit the truth and it is so self-evidently ridiculous that it really doesn't fit in anywhere.

When defendant showed officer Whitney the lease, the witness Whitney in his testimony, (Record page 41) said: "I told him to go and find the expressman and if he found him I would not arrest him. He went away and when he returned he said he could not find him then I arrested him."

But Whitney testified that defendant confessed his guilt and also that the unnumbered rooms were used for baggage rooms by defendant, and Whitney also said defendant was the guilty man, and yet, with brazen effrontery, this witness, an officer and assistant director, admits in open court that if the defendant had found the expressman, the defendant, the one guilty man, the confessed criminal, would not have been arrested.

The testimony of defendant reads like the evidence of an innocent man. He was offered immunity if he found the expressman who skipped out, because he could not produce the guilty man the defendant was arrested, thrown into jail, tried and convicted on evidence that is most doubtful in many respects. When defendant offered the evidence to show his innocence, and which evidently convinced the officer that the rooms were leased, why make the production of the guilty party a condition? If, as Mr. Whitney said, they "had the

right man," why offer to turn a guilty man free if he produced another man? Apparently some one must be convicted and it did not matter whether it was the expressman, who is the guilty party, or some one else. If defendant was not believed to be the guilty party, Why, I repeat, was the expressman permitted to go free. Whitney's explanation doesn't explain.

If the defendant was the only guilty man as Whitney says, why did he send for the expressman. According to Whitney, the expressman who was seen handling the liquor the liquor in question by Nchida, Record page 43, was innocent. The facts indicate that Whitney's vengeance was meted out to defendant because the expressman skipped out and could not be found.

At this time it may be timely and proper to call the attention of the court as well as that of Mr. Whitney to what the Secretary of the Treasury, Mr. Whitney's superior, says about the duties of a prohibition officer, and the following is taken from "Regulations 60, Relating to Intoxicating Liquor":

"Sec. 2210. Reports of investigating officers—Investigating officers will render prompt written reports of all detected violations. Such reports will be sworn to by the reporting officer and will show all pertinent facts, favorable as

well as unfavorable to the accused; if there is more than one investigating officer, the report will show what facts are within the knowledge of each. If the accused person is present when the investigation is made, he should be invited to make any voluntary statement he pleases, oral or written, and such statement should be included in the report. If he desires to swear to the statement, his oath should be taken by one of the investigating officers."

The defendant took his wife with him and told the officers who owned, bartered and sold that liquor, if anyone did, that it was an expressman who leased the rooms. Nchida testified to enough incriminating circumstances to convict the expressman, but he was never molested, although he was in Seattle for the past year.

Officers Whitney and Justi both testified that they destroyed no barrels in room 606. This evidence is material to defendant in several respects. One is that these two officers seem to have no regard for the truth. It is a common practice for them to destroy bars, liquor and all receptacles without the order of the court, and it seems strange that they should deny what occurred when the raid in question was made.

Mr. Parshal, a witness for the defense, described the condition after the officers left. (Record, page 47.)

The defendant testified that after his arrest he was given an axe and compelled by the officers to assist in destroying barrels. (Record, page 47, paragraph 1.)

Whitney and Justi positively denied destroying any barrels. This evidence was willingly and cheerfully given. Two witnesses denied the evidence of the officers. We will take a look at the officer's return, Record, page 32-33. If the officers were mistaken in this, perhaps their evidence should not be too strongly relied upon on other points.

RETURN OF SEARCH WARRANT.

Returned this 13th day of March, A. D. 1924.

Served and search made as within directed, upon which search I found 182 gallons of distilled spirits, (D. S.) 178 destroyed 2 lock and keys, 7 suit cases, held as evidence and samples of grape wine, 1 package papers, 33 boxes raisins, 1 press, 14 sacks sugar, 1 raisin grinder, 2 gallon metal cans.

Destroyed 13 gals. grape wine, 7 100 gal. bbls., 12 50 gal. bbls., 65 10 gal. kegs, 15 5 gal. kegs, 1 stove.

H. J. STETSON.

This return shows that in executing the search

warrant the officers destroyed 19 barrels, and 80 kegs.

Who told the truth, Whitney and Justi, or Parshal, the defendant and the officer's return? This return fails to mention that plaintiff in error was searched and some keys and paper were taken from his person. A warrant returned without a written return is void. A false return on a warrant also makes it void.

A warrant of every nature becomes absolutely void without a written return. This return in cases where the service is made by officers need not be verified, but an exception is made in the Search and Seizure Act, and all returns thereunder must be signed and sworn to and Sec. 13 of the Search and Seizure Act goes so far as to provide a form of the affidavit. In this case the verification was omitted and is not the warrant void without such a return as the law directs shall be made? Vorhees Law of Arrest, Sec. Ed., Secs. 35-37, inc., 39-45.

In view of such evidence, counsel requested the court orally, to instruct the jury on *falsus in uno*, *falsus in omnibus*, and also that owing to the defendant not being able to speak or understand the English language fluently, such evidence should be considered with caution, or words to that effect.

The court refused to instruct as requested, or at all. The court instructions were orally given. No suggestion was made that the instructions asked for should be reduced to writing.

The instructions should have been given.

We think it reversible error to refuse.

The officers forcibly searched defendant for evidence with which to convict him and used a key for that purpose. The search was a trespass as hereinabove shown. That a bunch of keys in a 60-room hotel contains a key or perhaps more, that opened one of the bootlegger's boxes is evidence, but not of such weight to sustain a conviction. Take that evidence out of the case and the prosecution has nothing left.

No living man can testify truthfully that appellant ever sold, or offered to sell or had in his possession any intoxicating liquor, and the evidence of officers and others is to the effect that he is a law abiding man and that for four years he was never molested or suspicioned until charged in this case by men whose written evidence and testimony show them to be untruthful and law violators, and but one piece of circumstantial testimony supplied by the evidence unlawfully taken from appellant's

person and introduced at the trial, tended to show even a trace of guilty knowledge and that evidence is too flimsy to support a conviction.

For four years not a breath of suspicion was ever directed against defendant or his hotel. When two bootleggers secured rooms there and were arrested, that good reputation of defendant's remained the same. When the officers needed assistance, the defendant assisted them in every way possible. For four years, and all his life never arrested until Whitney found it necessary to arrest him because he could not produce the guilty party.

“I don't know of a cleaner place in that district than the hotel conducted by defendant at 604½ 6th Avenue South. Not only as to liquor and bootlegging but we never took a woman out of his hotel. * * * His reputation and his hotel have the very best and highest reputation in the police department.”

That is what Sergeant Griffiths said under oath of the defendant and his hotel when a witness in this trial.

The second count charges maintaining a nuisance by manufacturing, keeping, selling and bartering intoxicating liquor.

Who testified to manufacturing by defendant?

Who testified to selling by defendant?

Who testified to bartering by defendant?

Who testified that defendant was keeping liquor.

No one.

Defendant proved himself innocent before he was arrested without warrant, searched without warrant, thrown into jail without authority of law. Forced to use an axe in breaking up barrels while under arrest.

With hundreds of gallons of liquor stored up, if the defendant had been implicated, some removals or sales could be proven against him. A man is fortunate who can prove as good a reputation as the defendant possesses and established in court.

Shall this man, on such flimsy and doubtful evidence, stand convicted of violating the laws of the United States and be forever branded as a criminal and outlaw?

Very respectfully submitted,

ADAM BEELEER,

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF
WASHINGTON
NINTH DIVISION

SUPPLEMENTARY BRIEF FOR
PLAINTIFF IN ERROR

ADAM BEELER,

Attorney for Plaintiff in Error

Seattle, Washington



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This supplementary brief is served and filed because of the fact that the opening brief, on behalf of the Plaintiff in Error, was prepared and filed by the original counsel in the case and before the present counsel had become actively connected therewith.

STATEMENT OF THE CASE.

The Plaintiff in Error was charged with the violation of the National Prohibition Act, by an information containing two counts.

In count 1, it was charged that on the 12th day of March, 1924, in the City of Seattle, the Plaintiff in Error was unlawfully in possession of certain intoxicating liquor therein described, with the intent to sell and dispose of the same.

In count 2, it was alleged that the Plaintiff in Error maintained a common nuisance in the City of Seattle, by the manufacturing, keeping and selling of intoxicating liquors (Trans. pp. 2 and 3).

To this information the Plaintiff in Error, when arraigned, entered a plea of "not guilty" (Trans. p. 4). Thereafter, and prior to the trial of the cause in the court below, the Plaintiff in Error moved to quash the search-warrant under which certain evidence had been seized and to suppress this evidence (Trans. pp. 22-23, 25-26).

This motion was based on the insufficiency of the affidavit for the search-warrant in that it failed to contain any statement of evidenciary facts, showing probable cause for the issuance of a search-warrant (Trans. pp. 28 and 29).

The motion to quash and the motion to suppress were supported by the affidavit of the Plaintiff in Error, and the affidavits of K. Shitama and Kiyoshi Muracka (Trans. pp. 33-37).

On the hearing the court denied these motions on the ground that the Plaintiff in Error, in his supporting affidavit, denied ownership, possession and control of the premises searched, and the property seized (Trans. p. 37). Thereafter, on the 18th day of December, 1924, the cause came on regularly for trial before the Honorable Edward E. Cushman, and a jury. Testimony was introduced on behalf of the Defendant in Error, to the effect that the defendant, at the time stated in the information, conducted an hotel in the City of Seattle, at 604½ 6th Avenue South, and that on that date several prohibition agents, fortified with a search-warrant, entered the basement under said hotel, known as 606 Sixth Avenue South, and there found a quantity of intoxicating liquor. There was no stair-way or entrance from the hotel into the basement. While the agents were searching the basement the Plaintiff in Error entered and exhibited to them a lease from him to a third person for the basement rooms, and in conversation at first admitted, but afterwards denied, that the basement storerooms and the contents belonged to him.

A quantity of the liquor seized and the containers were offered in evidence by the Defendant in Error. To this offer the Plaintiff in Error objected on the ground that it had been seized under AN INVALID search warrant. This objection was overruled and an exception allowed and entered, and thereupon the evidence in question was admitted and marked as an exhibit in the case (Trans. pp. 39 to 42).

The Plaintiff in Error, in his own behalf testified, that at the time mentioned in the information he owned and operated the Pacific Hotel, situated at 604½ Sixth Avenue South in the City of Seattle, and leased the rooms in the basement, to which there was no access from the hotel, to third persons for storage and manufacturing purposes and had no interest in nor control over them (Trans. pp. 45, 46). In this he was corroborated by other witnesses (Trans. pp. 43-47-48). At the close of the case and after having been instructed on matters of law by the trial judge, the jury returned a verdict finding the defendant "guilty" on each count of the indictment (Tr. p. 7), and thereafter on the 6th day of January, 1925, the court sentenced the Plaintiff in Error to pay a fine of three hundred (\$300.00) dollars on count one, and to serve three

months in the county jail of Whatcom County, Washington, on count two.

From that judgment and sentence this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

1. That during the trial of the cause in the court below, the trial court erred in admitting in evidence certain bottles, jars and demijohns of intoxicating liquor over the objection of the Plaintiff in Error, for the reason that this evidence, and all the evidence referred to by the prohibition agents, was seized under an illegal and void search warrant; the illegality consisting in the fact that the affidavit for the search warrant contained no statement of evidentiary facts, showing probable cause for the issuance of the search warrant.

ARGUMENT.

Prior to the trial on the merits a motion to quash the search warrant and a motion to suppress the evidence seized thereunder were interposed, and after a hearing, denied by the court on the sole ground that the Plaintiff in Error, in his supporting affidavit, denied ownership, possession and control of the premises searched, and the property seized. With the correctness of this holding it is

not now necessary to take issue for the reason that on the trial the Defendant in Error, in making its case in chief, introduced some (Tr. pp. 9-10) testimony to the effect that the Plaintiff in Error, at the time of his arrest, admitted ownership, possession and control of the premises searched, and thereupon the evidence seized under the search warrant was offered as an exhibit in the case.

The offer of this evidence was objected to by the Plaintiff in Error on the ground that it had been seized in the first instance under an unlawful and void search warrant. The fact that a motion to suppress had been introduced prior to the trial and denied did not preclude the defendant from raising the question of the invalidity of the search warrant during the course of the trial when the evidence seized was offered in evidence against him.

This course has been approved by the Supreme Court of the United States and followed by the lower Federal Courts in numerous instances.

In the case of *Gouled vs. United States*, 255 U. S. 298, the validity of the search warrant was attacked by a motion to suppress prior to the trial, and the motion denied. Thereafter, on the trial when the evidence seized under the search warrant was offered, objection was made and overruled. On

appeal to the Supreme Court it was argued that the question of the legality of the seizure could not be raised on the trial after it had once been passed upon on a motion to suppress, but this contention was brushed aside, the court saying:

“The papers being of ‘evidential value only,’ and having been unlawfully seized, this question really is, whether it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted by that court in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion, and to consider and decide the question as then presented even where a motion to return the papers may have been denied before trial.”

See also

Amos vs. U. S., 255 U. S. 313.
Agnello vs. U. S., 46 Supreme Court Rep. 6.
Agnello vs. U. S., 70 Law Ed. p. 4.
Weeks vs. U. S., 232 U. S. 383.
U. S. vs. Wexler, 4 Fed. Redp. 391 (2nd).
Ganci vs. U. S., 287 Fed. Rep. 60.
Salata vs. U. S., 286 Fed. Rep. 125.
Holmes vs. U. S., 275 Fed. Rep. 49.
O'Conner vs. Potter, 276 Fed. 32.
Agnello vs. U. S., 290 Fed. Rep. 671.

In the present case there were special circumstances which authorized the Plaintiff in Error to renew his motion to exclude the evidence unlawfully seized, when the same was offered during the course of the trial. The motion to suppress prior to the trial was denied because of a disclaimer of ownership on the part of the Plaintiff in Error of the premises searched and the property seized; the search warrant was directed to the three Japanese named therein, and the Plaintiff in Error was arrested because he voluntarily appeared upon the scene, while the prohibition agents were conducting their search. When the information was filed the three Japanese named in the search warrant were not included but the Plaintiff in Error was named as the sole defendant. On the trial the government produced witnesses who testified that the Plaintiff in Error had admitted to them ownership and con-

trol of the premises in question, and then offered in evidence the property seized. To this offer the Plaintiff in Error objected, and if it should appear that the evidence offered was seized under an invalid search warrant, this objection should have been sustained.

This brings us then to a consideration of the question of the validity of the search warrant proceedings. The affidavit for the search warrant contains the following as a statement of facts, constituting probable cause for the issuance of the search warrant, to-wit:

“That the crime, etc., is being committed in this, etc., one K. Hara, H. Y. Oka, Wani Kamol, K. Yakyo, true name unknown to this affiant, proprietors and their employees, 606 Sixth Avenue South, on the 11th day of March, 1924, and thereafter was and is possessing a still and distilling apparatus and materials designated and intended for the use in manufacturing intoxicating liquor and is manufacturing, possessing, transferring and selling intoxicating liquor all for beverage purposes; and that in addition thereto, affiant on said 11th day of March, 1924, and on previous occasions detected the odor of intoxicating liquor on said premises, and that said premises is not used as a residence but is a manufacturing plant.”

The search warrant, based upon this affidavit, recites that the persons named

“at said time and place possess a still, and distilling apparatus and materials designed and intended for the use in manufacturing intoxicating liquor and manufacturing, possessing, transferring and selling intoxicating liquor, all for beverage purposes.”

The return of this search warrant shows that no still or distilling appliances were found on the premises, but merely a quantity of intoxicating liquor and some boxes of raisins, sacks of sugar, cans, kegs and barrels (Tr. pp. 23-31-32).

The affidavit was insufficient to authorize the issuance of a valid search warrant, in that it contained no statement or recital of evidenciary facts but is general in its terms and recitals.

This question is no longer an open one in this court.

In *Lochnane vs. U. S.*, 2 Fed. Rep. 427 (2nd), it was held, that an affidavit for a search warrant, reciting that the defendants were the proprietors of a certain hotel and had been and were possessing, transferring and selling intoxicating liquor for beverage purposes on the hotel premises was insufficient to authorize the issuance of a search warrant and that evidence, seized under the search warrant, should have been suppressed. In the opinion in that case it was said:

“We are of opinion that the mere sworn general statement that a proprietor of a hotel at a certain place is unlawfully possessed of intoxicating liquor for beverage purposes, or is transporting or selling the same, is not sufficient to warrant a judicial finding of probable cause for the issuance of a search warrant which directs a search of the hotel named. It is fundamental that under title 1, section 5 of the Espionage Act, 40 Stat. 228 (Comp. St. 1918; Comp. St., Ann. Supp. 1919, p. 10212e), before a judicial officer is authorized to issue a search warrant, he must have before him, by affidavit or deposition the facts tending to establish the grounds of the application, or probable cause for believing that the facts exist. Tested by this requirement, the affidavit under consideration is fatally defective. It lacks any statement of an evidentiary fact tending to show that the defendants illegally possessed intoxicating liquor, or were transporting or selling liquor. Not a circumstance is set forth tending to show that affiant had any knowledge to support his conclusion. When the validity of such an affidavit was before the Circuit Court of Appeals for the First Circuit (*Giles vs. U. S.* 284, F. 208, 214) the court said: ‘It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner.’ *Tynan vs. U. S.* (C. C. A.), 297 F. 179; *Woods vs. United States* (C. C. A.), 279 F. 706. With that view we agree.”

It may be argued that the recital that the affiant had detected the odor of intoxicating liquor on said premises is a statement of an evidentiary fact. If so, standing alone, and unsupported and unexplained, it is clearly insufficient to warrant the issuance of the search warrant in question.

To render any such statement of evidentiary value, or sufficient for a finding of probable cause, the circumstances surrounding the detection of the odor, the place where the odor was detected, whether on the outside or the inside of the building; whether the windows and the doors were open or closed, and if open, how near to the aperture the affiant was stationed when he detected the odor and the experience of the affiant in such matters should all be shown.

The identical question was considered at some length in the case of *U. S. vs. Goodwin*, 1 Fed. Rep. 36 (2nd), a case heard in the District Court of the United States for the Southern District of California. In that case it was said:

“In a proper case, then, it appears that, to give full authority for the issuance of a search warrant, the evidence need establish probable cause only. This evidence may consist of proof of circumstances and conditions which, considered all together, may warrant the inference of

probable cause. The affidavit upon which the warrant was issued in this case recited that the affiant, after receiving numerous complaints that liquor was being manufactured and sold on the premises, 'made investigation and detected the strong odor of fermenting mash and saw several machines leave the premises.' The tangible evidence which that affidavit furnished is all contained in the statement just quoted, for it was not made to appear who the persons were from whom the hearsay complaints were received, or anything to show upon what facts such complaints were founded.

As to the quoted statement, the assertion that the investigator detected the strong odor of fermenting mash (from what part of the premises we are not informed) cannot be said to furnish sufficient proof of probable cause that the building which was afterwards searched was being used as a place wherein liquor was being manufactured to be sold or disposed of in violation of the law. The experience of the investigator might have been such as to authorize him to say that, from the appearance of things and considering the odor which he noticed, liquor was there being manufactured in commercial quantities and for purposes of sale. There are many small items of circumstances which can well be imagined open to the observation of a prohibition inspector, which, when fully set forth in an affidavit, would establish ground for the issuance of a warrant to search a building of any class in which liquor is being unlawfully manufactured. The court or the commissioner cannot, from the statement of the one fact that the investigator noticed about the premises an odor of fermenting mash, infer such a case."

In the present case, the recitals of the affidavit are not nearly as strong, comprehensive or satisfying as those in the case just cited, and were not sufficient to justify the Commissioner in issuing the search warrant in question. This being true, the court below should have sustained the objection of the Plaintiff in Error, when the evidence seized under the invalid search warrant was offered in evidence.

We respectfully submit that this case should be reversed with instructions to dismiss the same.

Respectfully submitted,

ADAM BEELER,

Attorney for Plaintiff in Error.

Seattle, Washington.

K. MATUSAKE, Plaintiff in Error
vs.
UNITED STATES OF AMERICA, Defendant in Error

Brief of Defendant in Error

Seattle, Wash.

F. D. MULLICK

The Prohibition office under a search warrant issued against 606 6th Ave., South, searched and seized certain intoxicating liquors. The defendant was apprehended at the time. Upon the trial a

motion was made to suppress the evidence, which was denied, and the only question now raised in the brief of the defendant and the only one raised by Assignment of Errors is the question of the lawfulness of the search and seizure.

ARGUMENT

Defendant in his affidavit on a motion to suppress, stated as follows:

“I understand that the officers found some liquor in two or three rooms, but no liquor was found in any room or place which was under my control.”

In view of the following statement and the evidence showing that the defendant leased the hotel which was above the rooms in which the liquor was found, and alleges that he had nothing to do with the bottling works wherein the liquor was found, no constitutional right of the defendant has been invaded, and therefore, this appeal should be dismissed and the judgment of the lower court affirmed.

Hale v. Henkel, 201 U. S. 43.

Bordeau v. McDonal, 256 U. S. 465.

Remus v. U. S., 268 Fed. 501.

Haywood v. U. S., 287 Fed. 69.

Schwartz v. U. S., 294 Fed. 528.

McDaniel v. U. S., 294 Fed. 769.

Agnello v. U. S., 269 U. S. 20, at page 35.

Respectfully submitted,

THOS. P. REVELLE,

United States Attorney.

C. T. McKINNEY,

Assistant United States Attorney.

Attorneys for Defendant in Error.

No. 4665

United States
Circuit Court of Appeals
For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASH-
INGTON, NINTH DIVISION.

REPLY BRIEF OF PLAINTIFF IN ERROR.

ADAM BEELER

and

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No.....

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STATEMENT.

Counsel for the Government in their three page answering brief, ask for the confirmation of the judgment of the trial court, which is tantamount to asking for a dismissal of defendant's appeal.

The reason for this most drastic demand and proceEDURE are that defendant presumed to, and did, move to suppress the evidence secured under an alleged void search warrant which was coupled with a statement that the liquor seized did not belong to him. It is also alleged that the brief of appellants alleges no other grounds of error.

Neither of the counsel whose names appear on their brief participated in the trial of the cause in the district court and their want of knowledge concerning the facts and the contents of appellant's brief is most glaring. A brief review will probably be beneficial to all concerned in this appeal.

Defendant conducted a hotel in a brick building at the corner of Sixth Avenue South and Weller Street in the City of Seattle. The building consisted of three floors and a full basement. See Exhibit A 1 pg. 52 of record. The defendant's hotel was on the second and third floors. The heating and hot water plant for the hotel were located in the southeast corner of the basement. There were two rooms, one for baggage and one for the boilers. The baggage room was not used by appellant. A partition between these two rooms connected them with a door. These two rooms were included in the hotel lease.

The defendant sublet the baggage room to an expressman, reserving the right of ingress to fire the boilers. Defendant's exhibit A 2 pg. 50 of record.

The liquor was all hid from view and was kept in containers that were put into boxes and suitcases and some of it was hidden in a blind stairway in the boiler room. The evidence secured under the search warrant was found in the baggage room and the blind stairway.

On pages 13, 14 and 15 of the record, we find one of the assignments of error was the overruling of the motion to suppress the evidence taken under a void search-warrant; another was overruling a motion to quash the search warrant and another related to the introduction of the evidence secured by the warrant. Then there follows an assignment that the court overruled a motion for a new trial which covered all of the rulings relating to the introduction of the evidence and rejection of instructions.

The grounds for the motion for a new trial will be found on page 8 of the record and are:

Errors of law occurring at the trial and excepted to at the time by the defendant, which pre-

vented the defendant from having a fair trial.

Newly discovered evidence.

The verdict is not supported by the evidence and is contrary to the testimony in said cause.

Counsel dare not discuss the many errors recited in appellant's opening and supplemental briefs. Their only answer is to plead an estoppel. They say that defendant may not plead that the search warrant used against him is absolutely void unless it be coupled with an admission that he is the owner of the liquor seized. In other words, defendant must admit his guilt, though innocent, before he can avail himself of the right to a full and complete defense. No appellate court has ever held that a party charged with crime will not be permitted to plead that a search warrant or any other warrant, is absolutely void. We do not mean voidable, but void, if it injuriously affects the defendant's life, liberty or property.

We also challenge counsel to discuss the questions raised in the record and in our opening brief, viz:

FIRST:

That under the Volstead Act and the Search

and Seizure Act of June 15th, 1917, a Search Warrant cannot be issued in misdemeanor cases.

SECOND:

The Court's refusal to instruct the jury on *falsus in uno, falsus in omnibus*, in the face of the most deliberate and wilful perjury, by Prohibition Agents.

In the *Agnello* case cited by counsel in their brief, Justice Butler says:

“Where by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. *A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.*” (Italics ours.)

But counsel say to appellant, “You did not claim the liquor taken under the alleged void warrant, and consequently you are estopped from attacking the warrant under which the liquor was taken. Because defendant refused to testify to an untruth—refused to say the liquor was his own property—he was estopped from attacking the void

warrant under which it was taken and which supplied the evidence by which he was convicted.

Courts and Prosecuting Attorneys seem to overlook the facts that quite frequently defendants have told juries the truth which juries refuse to believe. Quite often we read in the papers that some defendant, who declared his innocence to a jury, but was disbelieved, was convicted and executed, and thereafter the true murderer was revealed by death bed confession. These mistakes will occur. No power on earth will prevent some miscarriage of Justice. But punishment based on wrongful judgment of questions of law can be prevented, and should be. It is possible and most probable that defendant told the truth. There are many facts and circumstances that confirm that belief. One of the defendant's strongest defenses was taken away from him because he said he did not own the liquor seized. The fact that he was, however, found guilty and sentenced to imprisonment—the fact that the jury found against him with regard to the ownership of the liquor shows that in *some way or in some manner*, the defendant was entitled to have the motion to suppress heard on its merits and sustained. He was deprived of that defense under a rule of estoppel which can perhaps be approved

in civil practice, but is a glorious misfit under criminal procedure. The jury by its verdict said the liquor belonged to defendant. Then he is entitled to have the question of suppression litigated. We cannot get away from the defendant's claim that *in some way or in some manner* defendant was entitled to any and all evidence that will free him from the charge made against him.

In time the claims of estoppel approved by some courts, and invoked by the District Attorney in this case, must be discarded. The plea that a defendant is estopped or can ever be estopped from pleading that a writ is void under any and all circumstances and conditions when such a plea will produce an acquittal cannot long prevail.

Matusake, the defendant, as a part of his defense, asked the court to suppress the evidence that brought on his conviction. There was other evidence to suppress besides the liquor. There were keys and private papers. With the suppression of the evidence, conviction would not have been possible. The court virtually said by its ruling, though the search warrant is void, though the suppression of the evidence secured under the void warrant would bring about an acquittal, you shall by the action of

the jury, if so inclined, be convicted under the rule of estoppel.

To be found guilty by evidence unlawfully secured, under a search warrant, declared void in England from the time of Lord Coke to the trial of *Entick vs. Carrington* in 1765, and again declared void by the House of Commons in 1766, void under the common law in America, until the adoption of the Constitution and then made void by the Fourth Amendment in 1791 and again one hundred and thirty-five years thereafter, made void, by an Act of Congress of June 15th, 1917, is a misfit to the Constitutional rights guaranteed to persons charged with crime and the presumption of innocence. The principles of right and eternal justice would turn pale and tremble at the thought of generally applying the principles of estoppel in civil causes to that of criminal procedure. It cannot be done, except in a few isolated cases, without destroying the constitutional rights that have in the past, if not to the same extent at the present time, been held so dear and sacred by a great majority of the American people and American Courts. *Buty vs. Goldfinch*, 74 Wash. 532.

Estoppel in criminal causes is a dangerous

weapon, and we might say, of quite recent origin, although to a degree, its principles in very rare cases have always been recognized. We refer to estoppel in *pais*. Some writers on criminal law and procedure do not index the word. Wharton on Criminal Evidence speaks only of estoppel as it relates to judgments. One writer, in his encyclopedia, states, that the courts are divided as to whether the estoppel in civil practice should be applied to the criminal procedure. Black's Law Dictionary is silent as to criminal estoppel.

The name, as a matter of law, is a complete misfit. There could be none other than estoppel in *pais* in this case, and what the defendant said or did fits no estoppel as described by all the writers. Matusake said: "I don't own the liquor—the expressman leased the rooms from me, I only go in to fire the boilers." There was no deception. He made no statement to any person or officer which induced the latter to act upon. The raid was evidently made on the theory that the soft-drink manufacturer owned the liquor but defendant produced a lease and told the officers that the expressman owned the liquor. Defendant's possession was limited. He was not named in the warrant. The door was broken open and his leased property

damaged. Why should he not be permitted to urge upon the court the contention that the warrant was void?

One who reads our State and Federal Constitutions, the United States and various State laws, will most readily come to the conclusion that a person charged with crime in our courts, and especially the courts of the United States, will receive the benefits of the declared constitutional rights.

Has appellant, Matusake, had such a trial in this case? We think not, and our reasons are, that he was arrested by virtue of a search and seizure warrant that failed to describe the place to be searched and failed to state the defendant's name and which for other numerous reasons, shown in our opening brief, was absolutely void; his person was searched, his private papers, keys, etc., forcibly taken from him and he was brutally assaulted by an agent to whom he did not speak a word, and his only offense was to ask Agent Whitney to return to him the signed copy of the lease.

Counsel for the Government cite a few cases commencing with *Hale vs. Henkel*, 201 U. S. 43.

Mr. Justice Brown delivered the opinion of the court, in which it is said that two issues are pre-

sented, the first of these involves the immunity of the witness from oral examination, and the second the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*. This case was decided March 12th, 1906.

Bordeau vs. McDowell, 256 U. S. 465, is also a civil action and holds that stolen papers, when the thieves are not Government officials, may be used by the Government in presenting a cause to a grand jury. Justices Brandies and Holmes dissented. A perusal of the majority opinion, justifies the dissenting opinions.

Remus vs. U. S., 268 Fed. 501, is a mistaken citation.

Haywood vs. U. S., 287 Fed. 69, is also a mistaken citation.

Possibly *Luseo vs. U. S.* of the same volume and page was intended.

In this case the court holds that a co-defendant could not claim protection against unlawful search of co-defendant's premises. The rights of a co-defendant are not involved in this cause. Defendant simply says he was not the owner of the liquor seized and told the officers the lessee was the guilty party.

Schwartz vs. U. S., 294 Fed. 528, is a Texas court decision. One of the three defendants appealed. The question whether appellant's home was searched without a warrant was involved. The court found that it was not his home. This case holds that the search of the premises without a warrant where the officers saw a still, through an open door, was legal. In other words, that no search warrant is necessary if the officers know the prohibition law is being violated on suspected premises. If such is the law, what will become of the Fourth Amendment and the Search and Seizure Act of Congress of June 15th, 1917? Also the *Boyd*; *Guled* and the recent decision of *Agnello vs. U. S.*, cited by counsel for the Government? A positive requirement is that the officers *must* know that the law is being violated before any search warrant dare be issued, and more, the affidavit and warrant must show such knowledge and the corroborating witness must be named in the papers. The issuance of a search warrant prior to the enactment of the Volstead Act was considered a serious matter. The many decisions of the Supreme Court of the United States shows beyond the question of a doubt, that a search warrant must not be issued until the court issuing the same is supplied with evidence that

establish beyond doubt that an offense had been committed. Shall the sacred Fourth Amendment to the Constitution and the Search and Seizure Laws, enacted by Congress be swept aside, annulled and made useless in order that the man who carries a pint of liquor in his hip pocket, may be convicted of a misdemeanor, fined and sent to jail?

However, in the last case cited in the brief of the District Attorney's office, that of *Angello vs. U. S.*, 269 U. S. Sup. Court, pg. 20, Justice Butler sweeps aside that part of the *MacDaniel* and *Schwartz* cases that tended to legalize the unlawful search of premises without a search warrant.

“Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant,” said Justice Butler.

MacDaniel vs. U. S., 294 Fed. 769.

This is a Circuit Court decision from Ohio, in a case charging conspiracy. It decides nothing new or startling and has only a trifling bearing on the issues involved in this case.

If the great Government of the United States can lawfully use this warrant to commit these depredations, to arrest the defendant, search his premises, brutally assault him and with the aid of

their unlawful acts, convict him, will the court say he is getting a fair trial when it denies to the defendant the right to protest against the use of the warrant for such unlawful purposes, and to plead its invalidity?

When all of the errors of law have been considered, our final appeal to the court is that the evidence is insufficient upon which to base a verdict of guilty.

The evidence in the record shows the defendant a man of spotless character and reputation. He told the officers that the lessee was the owner of the contraband liquor. He and his wife made search for him. He was promised immunity if he produced the expressman. He could not be found. No effort was made by Mr. Whitney to apprehend him. Too much trouble to make a search for the guilty person. An innocent person was made a substitute. He now pleads for justice.

Very respectfully submitted,

ADAM BEELER

and

A. G. McBRIDE,

Attorneys for Plaintiff in Error.

10

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

AUG 25 1922

F. R. MONTGOMERY

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

FRED C. BROWN, Esquire, Attorney for Plaintiffs in Error,

201 Lyon Building, Seattle Washington.

THOS. P. REVELLE, Esquire, Attorney for Defendant in Error,

310 Federal Building, Seattle, Washington.

JOHN W. HOAR, Esquire, Attorney for Defendant in Error,

303 Federal Building, Seattle, Washington.

[1*]

(Comm'r #2737—Bail \$750 each.)

JEREMIAH NETERER.

United States District Court, Western District of Washington, Northern Division.

November, 1924, Term.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

INFORMATION.

BE IT REMEMBERED that Thos. P. Revelle, attorney of the United States of America for the

*Page-number appearing at foot of page of original certified Transcript of Record.

Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the district aforesaid on this 28 day of February, in this same term, and for the said United States gives the Court here to understand and be informed [2]

COUNT I.

That on the twenty-ninth day of August, in the year of Our Lord one thousand nine hundred and twenty-four, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, then and there being, did then and there knowingly, willfully, and unlawfully manufacture certain intoxicating liquor, to wit, four hundred twenty-two (422) gallons of a certain liquor known as wine, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said manufacturing by the said FRANK MILLER, ANTON BRONICH, and JOHN THOMAS as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said

Western District of Washington further informs the Court:

COUNT II.

That on the twenty-ninth day of August, in the year of Our Lord one thousand nine hundred and twenty-four, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, four hundred twenty-two (422) gallons of a certain liquor known as wine, and two (2) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and

against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the twenty-ninth day of August, in the year of Our Lord one thousand nine hundred and twenty-four, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at 139-27th Avenue North, in the said city of Seattle, FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, wine, distilled spirits, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said FRANK MILLER, ANTON BRONICH, and JOHN THOMAS, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute

in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,

United States Attorney.

J. W. HOAR,

Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 28, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [5]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

vs.

Plaintiff,

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

PETITION TO SUPPRESS EVIDENCE AND
FOR RETURN OF PROPERTY (FRANK
MILLER).

Your petitioner, Frank Miller, respectfully represents that he is one of the defendants in the above-entitled cause; that at all the times hereinafter mentioned he resided at 139-27th Avenue North, Seattle, Washington; that said premises

are and were a private dwelling and at all the times herein mentioned were occupied exclusively as such; and that at no time was any part of said premises used for any business purposes such as a store, shop, saloon, restaurant, hotel or boarding-house, nor was any intoxicating liquor sold or kept for sale therein.

Your petitioner avers that on the 27th day of August, 1924, Federal Prohibition Officers entered your petitioner's aforesaid dwelling, and over your petitioner's protest and objections, seized therein and removed therefrom intoxicating liquor and empty containers then and there in your petitioner's lawful custody and possession; and your petitioner is informed and believes that said Federal Prohibition Officers aforesaid seized said property and took the same into their possession for the purpose of procuring evidence against your petitioner and other persons on a charge of crime; that thereafter they were delivered by the said Federal Prohibition Officers to the United States District Attorney for the Western District of Washington in whose possession they still are; that the said United States District Attorney for the Western District of Washington issued and filed an information against your petitioner, and [6] intends to use the same upon the trial of said information, all in violation of your petitioner's rights under the Fifth Amendment to the Constitution of the United States.

Your petitioner further avers that in making said seizure said Federal Prohibition Officers acted under the pretended authority of a search-warrant issued by Robert McClelland, United States Com-

missioner for the Western District of Washington, a copy of which together with the official return endorsed thereon, is hereto attached and made a part hereof by this record and marked Exhibit "A."

Your petitioner further avers that said search-warrant was issued by said United States Commissioner solely upon the affidavit of J. M. Simmons, a Federal Prohibition Agent, a copy of which affidavit is hereto attached and made a part hereof by this reference and marked Exhibit "B."

And your petitioner respectfully represents that said search-warrant was wholly irregular and void and was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of Title XI of the Act of Congress of June 15, 1917, commonly known as the Espionage Act, and of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act, for all of the following reasons:

1. Said warrant was issued and executed for the purpose of procuring from your petitioner's possession evidence upon which to indict and prosecute him for crime, in violation of the Fifth Amendment to the Constitution of the United States.

2. Said search-warrant was issued and employed to search a private dwelling occupied as such by your petitioner, in violation of Section 25 of the National Prohibition Act.

3. Said search-warrant was void because neither the warrant itself nor the affidavits upon which it was issued named the owner or occupant of the premises to be searched, nor described with reason-

able [7] particularity, or at all, the property to be seized, or the property which was seized thereunder.

4. Said search-warrant was void because the affidavit upon which the same was issued did not set forth any facts tending to establish the grounds of the application, nor any facts from which said United States Commissioner could determine that said grounds existed.

WHEREFORE, your petitioner prays an order, directing the United States District Attorney to return to him his property aforesaid.

FRED C. BROWN,
Attorney for Petitioner.

State of Washington,
County of King,—ss.

Fred C. Brown, being first duly sworn, on oath deposes and says: That he is the attorney for the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

FRED C. BROWN.

Subscribed and sworn to before me this 9th day of April, 1925.

JACOB KOLING,
Notary Public in and for the State of Washington,
Residing in Seattle. [8]

EXHIBIT "A."

Local Form No. 103.

United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies, or Either of Them, and to any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or any Federal Prohibition Agent of said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents, or Inspectors, GREETING:

WHEREAS, J. M. Simmons, a Federal Prohibition Agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the NATIONAL PROHIBITION ACT of Congress by one JOHN DOE COSTELLO, RICHARD ROE MORENO and JANE DOE MAORI—true names unknown, proprietors and their employees at 139 27th Ave. North, who was, on the 27th day of August, 1924, and is, at said time and place, possessing and selling

intoxicating liquor, all for beverage purposes, on certain premises in the city of Seattle, County of King, State of Washington, and in said District, more fully described as

139 27th Avenue North, Seattle, Wash;
and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above named persons, and from him or her or from said premises seize any or all of the said property, documents, papers and materials so used in or about the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 27th day of August, 1924.

[Seal] ROBT. W. McCLELLAND,
United States Commissioner, Western District of
Washington. [9]

RETURN OF SEARCH-WARRANT.

Returned, this 29th day of Aug., A. D. 1924.

Served, and search made as within directed, upon which search I found

7-52 gal. wine.

3-5 gal. kegs wine.

4 empty 50-gal. bbls.

4-5 gal kegs.

empties, etc. papers.

and duly inventoried the same as above, according to law.

W. M. WHITNEY.

(Signature.)

I, _____, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

W. M. WHITNEY.

(Signature.)

Subscribed and sworn to before me this 29 day of Aug. 1924.

ROBT. W. McCLELLAND,

United States Commissioner.

_____ District of Wash.

EXHIBIT "B."

Local Form No. 100.

United States of America,

Western District of Washington,

Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR
SEARCH-WARRANT.

J. M. SIMMONS, being first duly sworn, on his

oath deposes and says: THAT he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the NATIONAL PROHIBITION ACT of Congress has been and is being committed in this, that, in the city of Seattle, County of King, State of Washington, and within the said District and Division above named, one John Doe Costello, Richard Roe Moreno and Jane Doe Maori, true names to affiant unknown, proprietors and their employees at 139 27th Ave. North, on the 27th day of August, 1924, and thereafter was and is possessing and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor, and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor all on the premises described as 139 27th Avenue, North, Seattle, Wash. and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties, all being in the County of King, State of Washington, and in said District, and all of said premises being occupied or under the control of the parties above named, proprietors and their employees, ALL in violation of the Statute in such cases provided and against the peace and dignity of the United States of America.

.

WHEREFORE this said affiant hereby asks that a Search-Warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said parties above named, proprietors and their employees, and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor and means of committing the crime aforesaid, all as provided by law and said Act.

W. M. WHITNEY.

Copy of within petition rec'd this 10th day of April, 1925.

J. W. HOAR,
Attorney for Plaintiff.

Subscribed and sworn to before me this 27th day of August, 1924.

ROBT. W. McCLELLAND,
United States Commissioner, Western District of
Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 10, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [10]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

DEFENDANT'S SUPPORTING AFFIDAVIT
(FRANK MILLER).

United States of America,
Western District of Washington,
Northern Division, King County,—ss.

Frank Miller, being first duly sworn, upon oath deposes and says: That he is an Austrian; that he is unmarried and for some time previous to the issuance of the search-warrant herein he resided at 139 27th Avenue North, Seattle, King County, Washington, as his sole residence, sleeping there and preparing his meals there; that since said service of said search-warrant he has and still continues to reside at said address as his sole residence for all purposes; that at and previous to the issuance of the search-warrant access to the basement of said house was reached by steps leading from the hall on the floor above directly into the basement or through a door from the outside of the house, and

the basement was used for storage of fuel and other articles generally kept in a basement.

FRANK MILLER.

Subscribed and sworn to before me this 27th day of April, 1925.

[Seal]

FRED C. BROWN,

Notary Public in and for the State of Washington,
Residing in Seattle. [10½]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

PETITION TO SUPPRESS EVIDENCE AND
FOR RETURN OF PROPERTY (ANTON
BRONICH).

Your petitioner, Anton Bronich, respectfully represents that he is one of the defendants in the above-entitled cause; that at all the times hereinafter mentioned he resided at 139 27th Avenue North, Seattle, Washington; that said premises are and were a private dwelling and at all the times herein mentioned were occupied exclusively as such; and that at no time was any part of said

premises used for any business purposes such as a store, shop, saloon, restaurant, hotel or boarding-house, nor was any intoxicating liquor sold or kept for sale therein.

Your petitioner avers that on the 27th day of August, 1924, Federal Prohibition Officers entered your petitioner's aforesaid dwelling and, over your petitioner's protest and objections, seized therein and removed therefrom intoxicating liquor and empty containers then and there in your petitioner's lawful custody and possession; and your petitioner is informed and believes that said Federal Prohibition Officers aforesaid seized said property and took the same into their possession for the purpose of procuring evidence against your petitioner and other persons on a charge of crime; that thereafter they were delivered by the said Federal Prohibition Officers to the United States District Attorney for the Western District of Washington in whose possession they still are; that the said United States District Attorney for the Western District of Washington filed an information against your petitioner, and intends [11] to use the same upon the trial of said information, all in violation of your petitioner's rights under the Fifth Amendment to the Constitution of the United States.

Your petitioner further avers that in making said seizure said Federal Prohibition Officers acted under the pretended authority of a search-warrant issued by Robert McClelland, United States Commissioner for the Western District of Washington, a copy of which together with the official return en-

dorsed thereon, is hereto attached and made a part hereof by this record and marked Exhibit "A."

Your petitioner further avers that said search-warrant was issued by said United States Commissioner solely upon the affidavit of J. M. Simmons, a Federal Prohibition Agent, a copy of which affidavit is hereto attached and made a part hereof by this reference and marked Exhibit "B."

And your petitioner respectfully represents that said search-warrant was wholly irregular and void and was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of Title XI of the Act of Congress of June 15, 1917, commonly known as the Espionage Act, and of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act, for all of the following reasons:

1. Said warrant was issued and executed for the purpose of procuring from your petitioner's possession evidence upon which to indict and prosecute him for crime, in violation of the Fifth Amendment to the Constitution of the United States.

2. Said search-warrant was issued and employed to search a private dwelling occupied as such by your petitioner, in violation of Section 25 of the National Prohibition Act.

3. Said search-warrant was void because neither the warrant itself nor the affidavits upon which it was issued named the owner [12] or occupant of the premises to be searched, nor described with reasonable particularity, or at all, the property to be seized, or the property which was seized thereunder.

4. Said search-warrant was void because the affidavit upon which the same was issued did not set forth any facts tending to establish the grounds of the application; nor any facts from which said United States Commissioner could determine that said grounds existed.

WHEREFORE, your petitioner prays an order, directing the United States District Attorney to return to him his property aforesaid.

FRED C. BROWN,
Attorney for Petitioner.

State of Washington,
County of King,—ss.

Anton Bronich, being first duly sworn, on oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

ANTON BRONICH.

Copy of within petition rec'd this 10th day of April, 1925.

J. W. HOAR,
Attorney for Plaintiff.

Subscribed and sworn to before me this 3d day of April, 1925.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing in Seattle.

Endorsed. [13]

EXHIBIT "A."

Local Form No. 103.

United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies, or Either of Them, and to Any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of Said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents, or Inspectors, GREETING;

WHEREAS, J. M. Simmons, a Federal Prohibition Agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the NATIONAL PROHIBITION ACT of Congress by one JOHN DOE COSTELLO—RICHARD ROE MORENO and JANE DOE MAORI—true names unknown, Proprietors and their employes at 139-27th Ave. North, who was, on the 27th day of August, 1924,

and is at said time and place, possessing and selling intoxicating liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as

139-27th Avenue North—Seattle, Wash.;

and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above-named persons, and from him or her or from said premises seize any or all of the said property, documents, papers and materials so used in or about the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 27th day of August, 1924.

[Seal] ROBT. W. McCLELLAND,
United States Commissioner, Western District of
Wash. [14]

RETURN TO SEARCH-WARRANT.

Returned, this 29th day of August, A. D. 1924.
Served, and Search made as within directed, upon
which search I found

7-52 gal. wine. 3-5 gal. kegs wine.

4 empty 50 gal. bbls. 4-5 gal. kegs.

empties, etc., papers.

and duly inventoried the same as above, according
to law.

W. M. WHITNEY.

(Signature.)

I, ————— the officer by whom this warrant
was executed, do swear that the above inventory
contains a true and detailed account of the property
taken by me on the warrant.

W. M. WHITNEY.

(Signature.)

Subscribed and sworn to before me this 29 day
of Aug., 1924.

ROBT. W. McCLELLAND,
United States Commissioner.

————— District of Wash.

EXHIBIT "B."

Local Form No. 100.

United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR
SEARCH-WARRANT.

J. M. Simmons, being first duly sworn, on his oath deposes and says: THAT he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the NATIONAL PROHIBITION ACT of Congress has been and is being committed in this, that, in the City of Seattle, County of King, State of Washington, and within the said District and Division above named, one John Doe Costello, Richard Roe Moreno and Jane Doe Maori, true names to affiant unknown, proprietors and their employees at 139-27th Ave. North, on the 27th day of August, 1924, and thereafter was and is possessing and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor, and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor all on the premises described as 139 27th Avenue, North, Seattle, Wash. and on the premises used, operated and occupied in con-

nection therewith and under control and occupancy of said above parties, all being in the County of King, State of Washington, and in said District, and all of said premises being occupied or under the control of the parties above named, Proprietors and their employees, ALL in violation of the Statute in such cases provided and against the peace and dignity of the United States of America.

WHEREFORE this said affiant hereby asks that a Search-Warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said parties above named, Proprietors and their employees, and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor and means of committing the crime aforesaid, all as provided by law and said Act.

W. M. WHITNEY.

Copy of within petition rec'd this 10th day of April, 1925.

J. W. HOAR,
Attorney for Plaintiff.

Subscribed and sworn to before me this 27th day of August, 1924.

ROBT. W. McCLELLAND,
United States Commissioner, Western District of
Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 10, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

DEFENDANT'S SUPPORTING AFFIDAVIT
(ANTON BRONICH).

United States of America,
Western District of Washington,
Northern Division, King County,—ss.

Anton Bronich, being first duly sworn, upon oath deposes and says: That he is an Austrian; that he is unmarried and for nine (9) months before the service of the search-warrant herein he had resided at 139 27th Avenue North, Seattle, King County, Washington, as his sole residence, sleeping there and preparing his meals therein; that since said service he has, and still continues, to reside at said address as his sole residence for all purposes; that at and previous to the issuance of the search-war-

rant, access to the basement of said house was reached by steps leading from the hall on the floor above directly into the basement or through a door from outside of the house, and the basement was used for storage of fuel and other articles generally kept in a basement.

ANTON BRONICH.

Subscribed and sworn to before me this 25 day of April, 1925.

[Seal]

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing in Seattle. [15½]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

PETITION TO SUPPRESS EVIDENCE AND
FOR RETURN OF PROPERTY (JOHN
THOMAS).

Your petitioner, John Thomas, respectfully represents that he is one of the defendants in the above-entitled cause; that at all the times hereinafter mentioned he resided at 139 27th Avenue North,

Seattle, Washington; that said premises are and were a private dwelling and at all the times herein mentioned were occupied exclusively as such; and that at no time was any part of said premises used for any business purposes such as a store, shop, saloon restaurant, hotel or boarding-house, nor was any intoxicating liquor sold or kept for sale therein.

Your petitioner avers that on the 27th day of August, 1924, Federal Prohibition Officers entered your petitioner's aforesaid dwelling and, over your petitioner's protest and objections, seized therein and removed therefrom intoxicating liquor and empty containers then and there in your petitioner's lawful custody and possession; and your petitioner is informed and believes that said Federal Prohibition Officers aforesaid seized said property and took the same into their possession for the purpose of procuring evidence against your petitioner and other persons on a charge of crime; that thereafter they were delivered by the said Federal Prohibition Officers to the United States District Attorney for the Western District of Washington in whose possession they still are; that the said United States District Attorney for the Western District of Washington filed an information against your petitioner, and intends [16] to use the same upon the trial of said information, all in violation of your petitioner's rights under the Fifth Amendment to the Constitution of the United States.

Your petitioner further avers that in making said seizure said Federal Prohibition Officers acted under the pretended authority of a search-warrant

issued by Robert McClelland, United States Commissioner for the Western District of Washington, a copy of which together with the official return endorsed thereon is hereto attached and made a part hereof by this record and marked Exhibit "A."

Your petitioner further avers that said search-warrant was issued by said United States Commissioner solely upon the affidavit of J. M. Simmons, a Federal Prohibition Agent, a copy of which affidavit is hereto attached and made a part hereof by this reference and marked Exhibit "B."

And your petitioner respectfully represents that said search-warrant was sholly irregular and void and was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of Title XI of the Act of Congress of June 15, 1917, commonly known as the Espionage Act, and of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act, for all of the following reasons:

1. Said warrant was issued and executed for the purpose of procuring from your petitioner's possession evidence upon which to indict and prosecute him for crime, in violation of the Fifth Amendment to the Constitution of the United States.

2. Said search-warrant was issued and employed to search a private dwelling occupied as such by your petitioner, in violation of Section 25 of the National Prohibition Act.

3. Said search-warrant was void because neither the warrant itself nor the affidavits upon which it was issued named the owner [17] or occupant of

the premises to be searched, nor described with reasonable particularity, or at all, the property to be seized, or the property which was seized thereunder.

4. Said search-warrant was void because the affidavit upon which the same was issued did not set forth any facts tending to establish the grounds of the application; nor any facts from which said United States Commissioner could determine that said grounds existed.

WHEREFORE, your petitioner prays an order, directing the United States District Attorney to return to him his property aforesaid.

FRED C. BROWN,
Attorney for Petitioner.

State of Washington,
County of King,—ss.

John Thomas, being first duly sworn, upon oath deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

JOHN THOMAS.

Subscribed and sworn to before me this 9th day of April, 1925.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing in Seattle. [18]

EXHIBIT "A."

Local Form No. 103.

United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies, or Either of Them, and to Any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents, or Inspectors, GREETING:

WHEREAS, J. M. Simmons, a Federal Prohibition Agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the NATIONAL PROHIBITION ACT of Congress by one JOHN DOE COSTELLO—RICHARD ROE MORENO and JANE DOE MAORI—true names unknown, Proprietors and their employees at 139 27th Ave. North, who was, on the 27th day of August, 1924, and is at said time and place, possessing and selling intoxicating

liquor, all for beverage purposes, on certain premises in the City of Seattle, County of King, State of Washington, and in said District, more fully described as

139 27th Avenue North—Seattle, Wash;
and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the daytime, or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above named persons, and from him or her or from said premises seize any or all of the said property, documents, papers and materials so used in or about the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

Given under my hand and seal this 27th day of August, 1924.

[Seal] ROBT. W. McCLELLAND,
United States Commissioner, Western District of
Wash. [19]

RETURN TO SEARCH-WARRANT.

Returned, this 29th day of Aug., A. D. 1924.

Served, and search made as within directed, upon which search I found

7-52 gal. wine, 3-5 gal. kegs wine,
4 empty 50 gal. bbls., 4-5 gal. kegs,
empties, etc., papers,
and duly inventoried the same as above, according to law.

W. M. WHITNEY.

(Signature.)

I, —————, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

W. M. WHITNEY.

(Signature.)

Subscribed and sworn to before me this 29 day of Aug., 1924.

ROBT. W. McCLELLAND,

United States Commissioner.

————— District of Wash.

EXHIBIT "B."

Local Form No. 100.

United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR
SEARCH-WARRANT.

J. M. Simmons, being first duly sworn, on his

oath deposes and says: THAT he is a Federal Prohibition Agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the NATIONAL PROHIBITION ACT of Congress has been and is being committed in this, that, in the City of Seattle, County of King, State of Washington, and within the said District and Division above named, one John Doe Costello, Richard Roe Moreno and Jane Doe Maori, true names to affiant unknown, proprietors and their employees at 139 27th Av. North, on the 27th day of August, 1924, and thereafter was and is possessing and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor, and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor all on the premises described as 139 27th Avenue, North, Seattle, Wash., and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties, all being in the County of King, State of Washington, and in said District, and all of said premises being occupied or under the control of the parties above named. Proprietors and their employees, ALL in violation of the Statute in such cases provided and against the peace and dignity of the United States of America.

WHEREFORE this said affiant hereby asks that a Search-Warrant be issued directed to the United States Marshal for the said District, and his deputies, and to any National Prohibition Officer or Agent or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said parties above named, Proprietors and their employees, and the premises above described, and seizure of any and all of the above described property and intoxicating liquor and means of committing the crime aforesaid, all as provided by law and said Act.

W. M. WHITNEY.

Copy of within petition rec'd this 10th day of April, 1925.

J. W. HOAR,

Attorney for Plaintiff.

Subscribed and sworn to before me this 27th day of August, 1924.

ROBT. W. McCLELLAND,

United States Commissioner, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 10, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [20]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,
Defendants.

DEFENDANT'S SUPPORTING AFFIDAVIT
(JOHN THOMAS).

United States of America,
Western District of Washington,
Northern Division, King County,—ss.

John Thomas, being first duly sworn, upon oath deposes and says: That he is an Austrian; that he is unmarried and for nine (9) months before the service of the search-warrant herein he had resided at 139 27th Avenue North, Seattle, King County, Washington, as his sole residence, sleeping there and preparing his meals therein; that since said service he has, and still continues to, reside at said address as his sole residence for all purposes; that at and previous to the issuance of the search-warrant, access to the basement of said house was reached by steps leading from the hall on the floor above directly into the basement or through a door from outside of the house, and the basement was

used for storage of fuel and other articles generally kept in a basement.

JOHN THOMAS.

Subscribed and sworn to before me this 27 day of April, 1925.

[Seal]

FRED C. BROWN,

Notary Public in and for the State of Washington,
Residing in Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 27, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [20 $\frac{1}{2}$]

In the United States District Court for the Western District of Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER et al.,

Defendants.

DECISION ON MOTION TO SUPPRESS EVIDENCE AND TO STRIKE AFFIDAVIT OF W. M. WHITNEY.

Filed May 13, 1925.

JEREMIAH NETERER, District Judge:

This matter is before the Court upon a motion

to suppress the evidence and to strike the affidavit of W. M. Whitney.

The Court holds by written opinion filed that the affidavit upon which the search-warrant was issued is insufficient, but denies the motion to suppress the evidence for the reason that the evidence may be admissible notwithstanding the unlawful search.

It is ordered that the motion to suppress be denied and the affidavit of W. M. Whitney be stricken. To the denial of the defendants' motion to suppress the evidence the defendants each duly except and the exceptions are noted.

NETERER,
U. S. District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 13, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [21]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

PLEA—EACH DEFENDANT.

Now on this 19th day of May, 1925, the above defendants come into open court accompanied by their attorney Fred C. Brown, and each enters his plea of not guilty to the charges herein against him.

Journal #13, page 345. [22]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH and
JOHN THOMAS,

Defendants.

TRIAL.

Now on this 23d day of June, 1925, this cause comes on for trial with all parties present. Fred C. Brown is present as counsel for defendants. A jury is empanelled and sworn as follows: Augustine Brookmeyer, Thomas E. Bremer, J. D. Storms, E. A. Borgen, Hugo Albrecht, B. J. Bloomskog, C. W. Miley, Gust E. Rasmussen, Chas. K. Miller, Ruel A. Russel, Caroline Jensen, and Clayton Aldridge. Opening statement is

waived by both sides. Government witnesses are sworn and examined as follows: W. M. Whitney, J. A. Johnson, C. W. Cline and A. A. Jacobson. Government exhibits numbered 1, 2, 3, 4, 5 and 6 and 7 are introduced as evidence. Government rests. Summary is made to the jury by attorneys for both sides. The jury after being instructed by the Court, retires for deliberation and return into court later with verdict. Verdict is received and reads as follows:

“We, the jury in the above-entitled cause, find the defendant, Frank Miller, is guilty as charged in Count 1, of the Information herein; and further find the defendant, Anton Bronich, is guilty as charged in Count 1 of the Information herein; and further find the defendant John Thomas is guilty as charged in Count I of the Information herein; and further find the defendant, Frank Miller is guilty as charged in Count II of the Information herein; and further find the defendant Anton Bronich is guilty as charged in Count II of the Information herein; and further find the [23] defendant, John Thomas is guilty as charged in Count II of the Information herein; and further find the defendant, Frank Miller is guilty as charged in Count III of the Information herein; and further find the defendant Anton Bronich is guilty as charged in Count III of the Information herein; and further find the defendant, John Thomas, is guilty as charged in Count III of the Information herein; Ruel A. Russell, foreman.

Sentence is set for July 6, 1925.

Journal #13, page 449. [24]

In the District Court of the United States for
the Western District of Washington, Northern
Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendant, Frank Miller, is guilty as *charge* in Count I of the Information herein; and further find the defendant, Anton Bronich, is guilty as charged in Count I of the Information herein; and further find the defendant, John Thomas, is guilty as charged in Count I of the Information herein; and further find the defendant, Frank Miller, is guilty as charged in Count II of the Information herein; and further find the defendant, Anton Bronich, is guilty as charged in Count II of the Information herein; and further find the defendant, John Thomas is guilty as charged in Count II of the Information herein; and further find the defendant, Frank Miller, is guilty as charged in Count III of the Information herein; and further find the defendant, — Anton Bronich, is guilty as charged in Count III of the Informa-

tion herein; and further find the defendant, John Thomas, is guilty as charged in Count III of the Information herein.

RUEL A. RUSSELL,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 23, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [25]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,
Defendants.

MOTION FOR NEW TRIAL.

Come now the defendants above named by their attorney, Fred C. Brown, and severally move the Court, on the files and records herein, for an order setting aside the verdict of the jury herein and granting them a new trial on the following grounds:

I.

Irregularity in the proceedings of the Court,

jury, and plaintiff; orders of the Court; and abuse of discretion; by which the defendants were prevented from having a fair trial.

II.

Insufficiency of the evidence to justify the verdict, and that it is against law.

III.

Error in law occurring at the trial and in the Court's ruling upon the petitions for the suppression of the evidence herein and duly excepted to at the time by the defendants.

FRED C. BROWN,
Attorney for Defendants.

[Endorsed]: Copy of within motion rec'd this 25th day of June, 1925.

Attorney for Plaintiff.

[Endorsed]: Received Office of U. S. Attorney June 25, 1925, Seattle, Wash.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 25, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [26]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

ORDER DENYING MOTION FOR NEW
TRIAL.

The several motions of the defendants for a new trial having come duly on for hearing on the 29th day of June, 1925, the Court having heard the arguments of counsel, and being fully advised in the premises,

IT IS ORDERED that the said motions be, and the same are hereby, denied. Each of the defendants is allowed an exception hereto.

Done in open court, this 6th day of July, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Copy of within order rec'd this
6th day of July, 1925.

J. W. HOAR,
Attorney for Pltf.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern

Division. Jul. 6, 1925. Ed M. Lakin, Clerk.
By S. M. H. Cook, Deputy. [27]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER,

Defendant.

SENTENCE (FRANK MILLER).

Comes now on the 6th day of July, 1925, the said defendant Frank Miller into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act, and that he be punished by being imprisoned in the Whatcom County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for

the term of six months on each of counts I and III, terms to run concurrently, and to pay a fine of \$200.00 dollars on count II. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

J. & D. #4, page 384. [28]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTON BRONICH,
Defendant.

SENTENCE (ANTON BRONICH).

Comes now on this 6th day of July, 1925, the said defendant Anton Bronich into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises it is considered ordered and adjudged by the Court that the defendant is guilty of violation the National Pro-

hibition Act and that he be punished by being imprisoned in the Whatcom County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the term of six months on each of counts I and III, terms to run concurrently, and to pay a fine of \$200.00 dollars on count II. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

J. & D. #4, page 384. [29]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN THOMAS,

Defendant.

SENTENCE (JOHN THOMAS).

Comes now on this 6th day of July 1925, the said defendant John Thomas into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said, where-

fore, by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the Whatcom County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on each of counts I and III, terms to run concurrently, and to pay a fine of \$200.00 dollars on count II. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

J. & D. #4, page 385. [30]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH and
JOHN THOMAS,

Defendants.

PETITION FOR WRIT OF ERROR OF DEFENDANTS FRANK MILLER, ANTON BRONICH AND JOHN THOMAS.

To the Honorable JEREMIAH NETERER, Judge of the Above-entitled Court:

Frank Miller, Anton Bronich, and John Thomas, by their attorney, Fred C. Brown, respectfully petition that on the 6th day of July, 1925, the United States District Court for the Western District of Washington, Northern Division, gave judgment against your petitioners in the above-entitled cause; wherein, as appears from the facts of the record of proceedings herein, certain errors were committed which are more fully set forth in the assignment of errors herein:

Now, therefore, to the end that said matters may be reviewed and said errors corrected by the Circuit Court of Appeals for the Ninth Circuit, your petitioners pray for an allowance of a writ of error, and such other orders and processes as may cause all and singular the record and proceedings in said cause to be sent to the Honorable Justices of the Circuit Court of Appeals for the Ninth Circuit, for review and correction;

And that an order be made, staying and suspending all further proceedings herein, pending the determination of said writ of errors by said Circuit Court of Appeals.

FRED C. BROWN,
Attorney for Frank Miller, Anton Bronich and
John Thomas.

Received a copy of the above order this 6th day of July, 1925.

J. W. HOAR,
Attorney for Plaintiff. [31]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [32]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH and
JOHN THOMAS,
Defendants.

ASSIGNMENT OF ERRORS.

Now comes the defendants, Frank Miller, Anton Bronich, and John Thomas, by Fred C. Brown, their attorney, and in connection with their petition for a writ of error herein assign the following errors, which he avers occurred at the trial of said cause and which were duly excepted by them, and upon which they rely to reverse the judgment entered herein against them:

I.

The District Court erred in denying the petitions

for the suppression of the evidence, seized by the United States Government prohibition officers in their residence on the 29th day of August, 1924, in violation of their rights under the Fourth Amendment to the Constitution of the United States.

II.

The District Court erred in denying the oral motion to suppress the evidence seized by the United States Government prohibition officers from their residence on the 29th day of August, 1924, in violation of their rights under the Fourth Amendment to the Constitution of the United States.

III.

The District Court erred in admitting in evidence Government Exhibits Nos. 1, 2, and 3, on the ground that it had been forcibly taken from their residence in violation of their rights under the Fourth Amendments to the Constitution of the United States. [33]

IV.

The District Court erred in denying the defendants' motion for a directed verdict, challenging the sufficiency of the evidence, made at the close of the Government's case, on the ground of a violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States; and further challenging of the evidence as to Anton Bronich and John Thomas, for the reason that they were not on the premises at the time of the execution of the search-warrant, and it was not a violation of the law in the presence of the officers.

V.

The District Court also erred as follows in admitting in evidence Government's Exhibit No. 1.

VI.

The District Court erred in admitting in evidence Government's Exhibit No. 2.

VII.

The District Court erred in admitting in evidence Government's Exhibit No. 3.

VIII.

The District Court erred in admitting in evidence Government's Exhibit No. 4.

IX.

The District Court erred in admitting in evidence Government's Exhibit No. 5.

X.

The District Court erred in admitting in evidence Government's Exhibit No. 7.

XI.

The District Court erred in compelling the attorney for the defendants to take the witness-stand and testify as follows: [34]

The COURT.—You haven't proven the signatures.

Mr. HOAR.—I will call Mr. Brown.

Mr. BROWN.—Will your Honor compel me to take the witness-stand?

The COURT.—Yes.

Mr. BROWN.—I want the record to show an objection.

The COURT.—Note the objection.

Mr. BROWN.—Exception.

FRED C. BROWN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

(Question by Mr. HOAR.)

Q. Handing you Government's Exhibit 4 for identification, I will ask you,—

Mr. BROWN.—I want the record to show I am an attorney in this case for all the defendants.

The COURT.—Yes, let it be noted.

Q. I will ask you if that is the signature of the defendant John Thomas?

Mr. BROWN.—I want to refuse to testify to that because of privileged communication between attorney and client; for the additional reason, the Government is compelling the defendants to give evidence against themselves, in the Government's case in chief.

The COURT.—The objection is overruled.

Q. (By the COURT.) It appears it is signed "Fred C. Brown, Notary Public," is that your designation?

Mr. BROWN.—If your Honor overrules the objection I want an exception.

Q. I want to know if you are the notary before whom this was taken?

A. Yes, I am a notary.

The COURT.—Objection overruled.

Mr. BROWN.—Exception.

A. Now what is the question?

Q. I will ask you whether the signature there of John Thomas [35] is the signature of the defendant in this case? A. Yes, sir.

Q. I will ask you, referring to Government's Exhibit 5 for identification, if the signature of Anton Bronich is the signature of the defendant, Anton Bronich, in this case?

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

A. It is.

Q. Referring to Government's Exhibit 6,—

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

Q. I will ask you if that is your signature there as the party swearing to it?

A. That is my signature.

The COURT.—The objection to that is sustained.

Q. That affidavit is as to the defendant Frank Miller made by counsel and filed in court.

The COURT.—The objection is sustained as to Government's Exhibit 6.

Q. Directing your attention to Government's Exhibit No. 7 for identification, I will ask you if the signatures of Frank Miller, John Thomas and Anton Bronich on the separate sheets are the signatures of each of the defendants?

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

A. They are.

Mr. BROWN.—Now I want to renew my objection.

Mr. HOAR.—I would like to read them to the jury.

The COURT.—They have not been admitted yet.

Mr. HOAR.—I will offer Exhibits 4, 5, and 7.

Mr. BROWN.—I want to object on the same grounds as heretofore urged. [36]

The COURT.—Nos. 4, 5, and 7. No. 4, I think this copy of the search-warrant,—

Mr. HOAR.—I don't care to offer that.

The COURT.—That can be detached and the rest can be admitted with the copy detached. No. 5.

(Petition received in evidence and marked Government's Exhibit No. 4.)

Mr. HOAR.—Same situation.

The COURT.—That is the same; that copy of the search-warrant may be detached, and the rest admitted. And No. 7 admitted, and exception noted.

(Petition and affidavit received in evidence and marked Government's Exhibits 5 and 7.)

Mr. BROWN.—I still maintain, according to these petitions for search-warrants, they either went on to those premises in pursuance of the search-warrant, or they went upon it because there was a crime being committed in the presence of the officers; I still maintain that the evidence is fatally defective, it was not a crime in the presence of

Bronich and Thomas; Bronich and Thomas were not upon the premises at the time of the search.

The COURT.—I will overrule the objection.

Mr. BROWN.—Exception.

XII.

The District Court erred in denying the defendants' renewal of the motion challenging the sufficiency of the evidence at the close of the case, and further on the ground that Anton Bronich and John Thomas were not upon the premises, and it was not a crime committed in the presence of the officers; and that the evidence was obtained in violation of the rights of the defendants under the Fourth and Fifth Amendments to the Constitution of the United States.

XIII.

The District Court erred in denying defendants' motion for a new trial. [37]

XIV.

The District Court erred in pronouncing judgment upon the defendants.

WHEREFORE, the said defendants, Frank Miller, Anton Bronich, and John Thomas, plaintiffs in error, pray that the judgment of said Court be reversed, and this cause be remanded to said District Court with instructions to dismiss the same and discharge the plaintiffs in error from custody and exonerate the sureties on their bail bonds; and for

such other and further relief as to the Court seems proper.

FRED C. BROWN,
Attorney for Defendants, Frank Miller, Anton
Bronich, and John Thomas.

Due service admitted the 6th day of July, 1925.

J. W. HOAR,
United States District Attorney.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Jul. 6, 1925. Ed. M. Lakin, Clerk. By
S. M. H. Cook, Deputy. [38]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

ORDER ALLOWING WRIT OF ERROR.

The plaintiffs in error having duly presented
their petitions for a writ of error and assignments
of error to the Circuit Court of Appeals, having
duly issued and the Court having duly fixed the
bond of plaintiffs in error in the sum of One Thou-

said Five Hundred Dollars (\$1,500) each, and said bonds having been duly filed and approved; now, on motion of the plaintiffs in error.

IT IS ORDERED that the execution of the judgment herein be stayed, pending the determination of the writ of error in the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 6th day of July, 1925.

JEREMIAH NETERER,

Judge.

[Endorsed]: Copy of within — rec'd this 6th day of July, 1925.

J. W. HOAR,

Attorney for Ptf.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [39]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER. ANTON BRONICH. and
JOHN THOMAS.

Defendants.

APPEAL AND BAIL BOND (FRANK MILLER).

KNOW ALL MEN BY THESE PRESENTS: That we, Frank Miller, as principal, and National Surety Company, as surety, all of Seattle, King County, Washington, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of One Thousand Five Hundred Dollars (\$1,500) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION of this obligation is such that, whereas the said defendant was, on the 6th day of July, 1925, sentenced in the above-entitled cause \$200.00 and six months Whatcom County Jail, and whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled Court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand Five Hundred Dollars (\$1,500);

Now, therefore, if the said defendant, Frank Miller, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said

Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process [40] issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 6th day of July, 1925.

FRANK MILLER.

[Seal] NATIONAL SURETY COMPANY.

By O. B. WHITE,

Attorney-in-fact.

Approved 6th July, 1925.

NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, North-

ern Division. July 6, 1925. E. M. Lakin, Clerk.
By S. M. H. Cook, Deputy. [41]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

APPEAL AND BAIL BOND (ANTON BRO-
NICH).

KNOW ALL MEN BY THESE PRESENTS:
That we, Anton Bronich, as principal, and National
Surety Company, as surety, all of Seattle, King
County, Washington, are held and firmly bound
unto the United States of America, plaintiff in
the above-entitled action, in the penal sum of One
Thousand Five Hundred Dollars (\$1,500) lawful
money of the United States, for the payment of
which, well and truly to be made, we bind our-
selves, and our and each of our heirs, executors,
administrators, successors and assigns, jointly and
severally, firmly by these presents.

THE CONDITION of this obligation is such
that, whereas the said defendant was, on the 6th
day of July, 1925, sentenced in the above-entitled

cause to \$200.00 and six *months* Whatcom County Jail, and whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand Five Hundred Dollars (\$1,500);

Now, therefore, if the said defendant, Anton Bronich, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said appellate court shall make, or order to be made in the premises, and [42] shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made and entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said

District Court, then this obligation to be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this 6th day of July, 1925.

ANTON BRONICH.
NATIONAL SURETY COMPANY.

[Seal]

By O. B. WHITE,
Attorney-in-fact.

Approved 6th of July, 1925.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [43]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH and
JOHN THOMAS,

Defendants.

APPEAL AND BAIL BOND (JOHN THOMAS).

KNOW ALL MEN BY THESE PRESENTS:
That we, John Thomas, as principal, and National

Surety Company, as surety, all of Seattle, King County, Washington, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of One Thousand Five Hundred Dollars (\$1,500) lawful money of the United States, for the payment of which, well and truly to be made, we bond ourselves, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION of this obligation is such that, whereas, the said defendant was, on the 6th day of July, 1925, sentenced in the above-entitled cause to \$200.00 and six *months Whatcom* County Jail, and whereas, the said defendant, has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court to Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand Five Hundred Dollars (\$1,500);

Now, therefore, if the said defendant, John Thomas, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process issued, or [44] ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of

any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 6th day of July, 1925.

JOHN THOMAS.

NATIONAL SURETY COMPANY.

[Seal]

By O. B. WHITE,

Attorney-in-fact.

Approved 6th July, 1925.

NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 6, 1925. By S. M. H. Cook, Deputy.

[45]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore, to wit, on the 23d of June, 1925, this cause came on for trial before the Honorable Jeremiah Neterer, District Judge, the plaintiff appearing by Thos. P. Revelle and John W. Hoar, United States Attorney and Assistant United States Attorney, respectively, the defendants appearing by Fred C. Brown, their attorney, and thereupon the following proceedings were had:

When said cause was called for trial and before any other proceedings were had therein, the defendants presented to the Court, orally, their several petitions for the suppression of the evidence seized by the Federal Prohibition Agents in their possession and in their residence at 139 Twenty-seventh Avenue North, Seattle, Washington, on the 29th day of August, 1924, on the grounds specified in the formal petitions therefor filed by the defendants, the petition of Frank Miller being verified by his

attorney and the petitions of Anton Bronich and John Thomas being verified by each of them on the 9th day of April, 1925, and after full consideration thereof said petitions were denied and petitioners were allowed an exception.

TESTIMONY OF W. M. WHITNEY, FOR PLAINTIFF.

Whereupon, W. M. WHITNEY was called as a witness by the plaintiff and after being duly sworn testified that for three years and a half he has been an assistant prohibition director for the State of Washington; [46] that he is acquainted with the defendants Frank Miller and Anton Bronich and is familiar with the residence known as 139 Twenty-seventh Avenue North in the city of Seattle; that he had occasion to visit those premises on the 29th of August, 1924, in the company of agents James A. Johnson and C. W. Cline, together with a driver named Philips, at which time the defendant Frank Miller was working in a little front yard right in front of the door that goes into the basement; that the house consists of a basement, and two stories; that the front part of the premises are up high enough for a basement in the front on Twenty-seventh Avenue; that the basement door had a new lock on it which he had noticed when he had been out there on a previous occasion; that Frank Miller had the basement door open and was working with a plane doing some carpenter work on a trestle; that when he came down the side street from the rear he could distinctly smell the odor from fer-

(Testimony of W. M. Whitney.)

menting mash; that he had smelled that before when he was there; that he could see in the open basement door several empty boxes, raisin boxes—raisins in boxes and boxes without raisins in, half a sack of sugar— part of a sack, about twenty-five (25) or thirty (30) pounds in it, and a 10-gallon keg in burlap with about six inches of the top of the keg showing; This basement is divided into two rooms; he could also see the partition between the two rooms and it was made of new lumber; that there was a door. He stopped and talked with Mr. Miller for a few moments then told him who he was, gave him the search-warrant; * * * the fermenting odor came right out the front door, he could smell it plainly while standing talking to Mr. Miller; he then entered the house—went in the door of a room of the basement—and found several vats with grapes fermenting in them; some of it was low percentage of alcohol—about two or three per cent—and some of the rest of it was completely fermented.

Witness further testified he found one 52-gallon barrel, three 5-gallon kegs, and one 10-gallon keg, all full of wine; the three small [47] kegs were in burlap sacks so fixed that they—that you could take hold of the burlap and carry them, the usual way, from our experience, kegs containing intoxicating liquor *is* carried. That he found several small boxes of raisins, some more sugar, several empty barrels, with a small amount of grape mash in the bottom of the barrels all giving off a very

(Testimony of W. M. Whitney.)

strong odor of fermentation; several empty kegs in burlap sacks of the same kind as in the basement. In the upstairs was a bottle with some moonshine whiskey in one of the rooms. Mr. Miller showed him his room; there were two other rooms in the upstairs part, one of which was occupied by Mr. Bronich. His abstract of the premises were in it, or deed to the premises, and letters all having the name of Anton Bronich on them and giving the address of 504 Sixth Avenue South, which was his place of business. One of the other rooms had clothing, which was occupied by John Thomas; it had letters in there and other personal effects and papers in the name of John Thomas and giving the same address as Anton Bronich's; he also found a coil of a still,—there was an electric stove; for warming the fermenting grape mash; there was hid away seven 50-gallon barrels of wine in the process of fermentation, some complete and some not, making 350 gallons in the barrels in addition to the completed wine.

This basement had fairly recently been partitioned off, the lumber was new, the floor was fairly new on which the barrels were sitting; Mr. Miller stated he had been there some weeks.

Witness further testified from his experience that it is very difficult, especially if it is spilled, to eradicate the smell of intoxicating liquor on premises because it soaks into the lumber—espe-

(Testimony of W. M. Whitney.)

cially if it is new boards—and leaves a very permeating odor, very noticeable.

Witness further said that 504 Sixth Avenue South was the defendants Anton Bronich and John Thomas owned a soft-drink place.

On cross-examination the witness testified that the residence is two stories and a half high and is in the residential section; that [48] the upstairs or second floor is connected with the basement by steps inside the house, there are some steps from the front room into the basement; that the top floor was occupied by the three defendants in three different rooms; that one of the agents had been out there several times and had obtained the search-warrant to search the place, and he had been there once before; that the search-warrant the agent had obtained was the one that he took when he went out on the 29th of August, 1924, with the intention of searching the premises; that the front of the yard the ground is elevated above the street; that he had to walk up two or three steps, and he gave Mr. Miller the search-warrant and spoke a few words and went into the basement and commenced the search; that he did not notice that there was a small amount of wood and coal in the basement.

Witness further testified in redirect examination that the intoxicating liquor had more than one-half of one per cent of alcohol and was fit for beverage purposes as he tasted practically every barrel.

(Testimony of W. M. Whitney.)

Witness further testified that he smelled it on the place before he entered the premises and before even he pulled the search-warrant out of his pocket and served it and told who he was; that Government's Exhibit No. 2 was taken from the 52-gallon barrel; No. 1 was taken from the 10-gallon keg, and the bottle of moonshine, No. 3, was found in one of the upstairs rooms.

Witness further testified on recross-examination that before he went into the house he gave Mr. Miller the search-warrant.

TESTIMONY OF JAMES A. JOHNSTON, FOR PLAINTIFF.

Whereupon Mr. JAMES A. JOHNSTON was called as a witness for the plaintiff and testified that for two and one-half years he had been a Federal Prohibition Agent; that he was with Mr. Whitney on August 29th at the time they visited the premises at 139 Twenty-seventh Avenue North and helped to search the premises; that they found several barrels of fermenting grape mash; that as they approached the premises the odor of fermenting grapes was plain; that they found some papers which [49] were turned over to Mr. Whitney and he did not examine the papers.

Under cross-examination witness testified that they did not find any corn on the premises, nothing but wine and grapes; that the wine was made, apparently, from raisins.

TESTIMONY OF C. W. KLINE, FOR PLAINTIFF.

Whereupon Mr. C. W. KLINE was called as a witness for plaintiff and testified that his duties as Federal Prohibition Agent was to take charge of all liquor seized by the agents, keep them, and take them into court, analyze all distilled spirits for their alcoholic contents; that the Government's Exhibit No. 3 was 100 proof, 50 alcohol, fit for beverage purposes; that Exhibits No. 1 and No. 2 had been in his possession and were turned over to Mr. Jacobson on the following Monday after the raid to be analyzed, and the city chemist fetched them back on the following Tuesday or Wednesday, and that they had been in the vault ever since.

Witness further testified that he was in the premises at the time of the raid and saw the wine; that it was possible to smell the fermentation very plainly when they came down the side street; that the basement door was open and that he saw Mr. Miller at the time and he stated that he lived there and had been there about two weeks, and that he was found there fixing up the house.

On cross-examination witness testified the agents went there together and he knew Mr. Whitney had a search-warrant to search the premises, and went there for that purpose and to execute that search-warrant; and that when they got on the premises, Mr. Whitney went up to Mr. Miller and gave him the search-warrant and they all went into the

(Testimony of C. W. Kline.)

building and discovered the liquor; that you could see the liquor before you entered the building, and he saw the keg also in a sack, which was full of wine, before they went into the house. [50]

TESTIMONY OF W. M. WHITNEY, FOR
PLAINTIFF (RECALLED—CROSS-EX-
AMINATION).

Mr. WHITNEY, recalled for further cross-examination, testified as follows: That all three defendants lived upon the premises; that Mr. Bronich had the title to them and that he gave back to him the abstract and deed to the property, and he stated he owned the property.

Mr. Whitney further testified on redirect examination that Mr. Bronich, as he remembered, lived in the front room upstairs, Mr. Miller in a small middle room, and Mr. Thomas in the east room; that Mr. Bronich owned the fee title to the property; that he saw the abstract which showed a transfer to Mr. Bronich and that Mr. Bronich told him he owned it, and later came to the office and that he returned the papers to Mr. Bronich; that it was their residence, the three of them occupying the place as their residence.

TESTIMONY OF A. JACOBSON, FOR PLAINTIFF.

Whereupon A. JACOBSON was called as a witness for the plaintiff and testified that he analyzed Government's Exhibits No. 1. and No. 2 for their

(Testimony of A. Jacobson.)

alcoholic content and that Exhibit No. 1 contained 8.5 per cent alcohol and Exhibit No. 2 contained 9.1 per cent of alcohol; that he had been a chemist for twenty-two (22) years.

Mr. HOAR.—I will offer these exhibits in evidence.

Mr. BROWN.—I object to the introduction of this liquor in evidence on the ground it has been forcibly seized and taken from their residence,—the defendants' residence—in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States. There is no question about this being the residence of the defendants.

The COURT.—Do these men have families?

Mr. BROWN.—No. They are all single men living on the premises.

The COURT.— * * * the search-warrant was, of course, invalid. * * * the motion is denied.

Mr. BROWN.—Exception.

The COURT.—They will be admitted. [51]
(Government's Exhibits Nos. 1, 2, and 3, bottles of liquor, received in evidence and marked Government's exhibits as above numbered.)

Whereupon the Government rested, and the defendants challenged the sufficiency of the evidence on the ground of the violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and further challenged the evidence as to Anton Bronich and

(Testimony of Fred C. Brown.)

John Thomas, on the ground that they were not on the premises and it was not violation of law in the presence of the officers.

Whereupon the Government asked the privilege of reopening the case, which was granted.

The COURT.—You haven't proven the signatures.

Mr. HOAR.—I will call Mr. Brown.

Mr. BROWN.—Will Your Honor compel me to take the witness-stand?

The COURT.—Yes.

Mr. BROWN.—I want the record to show an objection.

The COURT.—Note the objection.

Mr. BROWN.—Exception.

TESTIMONY OF FRED C. BROWN, FOR THE GOVERNMENT.

FRED C. BROWN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

(Questions by Mr. HOAR.)

Q. Handing you Government's Exhibit 4 for identification, I will ask you,—

Mr. BROWN.—I want the record to show I am an attorney in this case for all the defendants.

The COURT.—Yes, let it be noted.

Q. I will ask you if that is the signature of the defendant John Thomas? [52]

Mr. BROWN.—I want to refuse to testify to that because of privileged communication between at-

(Testimony of Fred C. Brown.)

torney and client; for the additional reason, the government is compelling the defendants to give evidence against themselves in the Government's case in chief.

The COURT.—The objection is overruled.

Q. (By the COURT.) It appears it is signed "Fred C. Brown, Notary Public." Is that your designation?

Mr. BROWN.—If your Honor overrules the objection I want an exception.

Q. I want to know if you are the notary before whom this was taken?

A. Yes, I am a notary.

The COURT.—Objection overruled.

Mr. BROWN.—Exception.

A. Now what is the question?

Q. I will ask you whether the signature there of John Thomas is the signature of the defendant in this case? A. Yes, sir.

Q. I will ask you, referring to Government's Exhibit 5 for identification, if the signature of Anton Bronich is the signature of the defendant, Anton Bronich, in this case?

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

A. It is.

Q. Referring to Government's Exhibit 6,—

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

(Testimony of Fred C. Brown.)

Q. I will ask you if that is your signature there as the party swearing to it?

A. That is my signature. [53]

The COURT.—The objection to that is sustained.

Q. That affidavit is as to the defendant Frank Miller made by counsel and filed in court.

The COURT.—The objection is sustained as to Government's Exhibit 6.

Q. Directing your attention to Government's Exhibit No. 7 for identification, I will ask you if the signatures of Frank Miller, John Thomas and Anton Bronich on the separate sheets are the signatures of each of the defendants?

Mr. BROWN.—Same objection.

The COURT.—Same ruling.

Mr. BROWN.—Exception.

A. They are.

Mr. BROWN.—Now I want to renew my objection.

Mr. HOAR.—I would like to read them to the jury.

The COURT.—They have not been admitted yet.

Mr. HOAR.—I will offer Exhibits 4, 5, and 7.

Mr. BROWN.—I want to object on the same grounds as heretofore urged.

The COURT.—Nos. 4, 5, and 7. No. 4, I think this copy of the search-warrant,—

Mr. HOAR.—I don't care to offer that.

The COURT.—That can be detached and the rest can be admitted with the copy detached. No. 5.

(Petition and affidavit received in evidence and marked Government's Exhibit No. 4.)

Mr. HOAR.—Same situation.

The COURT.—That is the same; that copy of the search-warrant may be detached, and the rest admitted. And No. 7 admitted and exception noted.

(Petition and affidavit received in evidence and marked Government's Exhibits 5 and 7.)

Mr. BROWN.—I still maintain, according to these petitions for search-warrants, they either went on to those premises in pursuance of the search-warrant or they went upon it because there was a crime being committed in the presence of the officers; I still maintain that the evidence is fatally defective, it was not a crime in the presence of Bronich and Thomas; Bronich and Thomas were not upon the premises at the time of the search.
[54]

The COURT.—I will overrule the objection.

Mr. BROWN.—Exception.

Government rests.

Whereupon the defendants challenged the sufficiency of the evidence on the grounds as before enumerated. The motions were denied and exception allowed.

Thereafter, without introducing any evidence, the defendants rest and renew their challenge to the sufficiency of the evidence as before; and further that it was not a crime committed in the presence of the officers by Anton Bronich and John Thomas. The motion was denied and exception noted.

FRED C. BROWN,

Attorney for Plaintiffs in Error.

Settled and allowed this 14 day of July, 1925.

JEREMIAH NETERER,

District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1925. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [55]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER SETTLING AND CERTIFYING BILL
OF EXCEPTIONS.

On this 10th day of July, 1925, the above cause coming on to be heard upon the application of the plaintiffs in error, Frank Miller, Anton Bronich, and John Thomas, to settle a bill of exceptions in said cause, the plaintiffs in error appearing by their attorney Fred C. Brown, and the defendant in error appearing by the United States District Attorney, and it appearing to the Court that the bill of exceptions was duly served on the attorneys for the plaintiffs within the time provided by law, and that,

all the parties consent to the signing and settling of the same, and that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that the said bill of exceptions contains all the material facts occurring in the trial of said cause together with the exceptions thereto, and all the material matters and things occurring upon the trial except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions, and the clerk of the court is hereby ordered and instructed to properly mark and identify such exhibits and attach the same thereto, or in case it is inconvenient or not practicable to attach said exhibits, to properly identify them in the cause and to forward them unattached, as part of the bill of exceptions;

Thereupon, on motion of the plaintiffs in error, Frank Miller, [56] Anton Bronich, and John Thomas, it is hereby ORDERED that said proposed bill of exceptions be and it is hereby settled as the true bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct bill of exceptions; and the clerk is hereby ordered to file the same as the record in said cause and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
District Judge.

Copy of attached bill of exceptions received and the service thereof admitted upon 11th July, 1925.

THOS. P. REVELLE,

J. W. HOAR,

Attorneys for Defendant in Error. [57]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Information.

The petitions of Frank Miller, Anton Bronich, and John Thomas to suppress evidence, with the attached copies of affidavit for search-warrant and search-warrant.

Affidavit supporting motion.

Decision on motion to suppress evidence, filed May 13, 1925.

Plea.

Record of trial and impaneling of jury.

Verdict.

Motion for new trial.

Order denying motion for new trial.

Judgment and sentence.

Petition for writ of error.

Assignments of error.

Order allowing writ of error and fixing the amount
of bond.

Appeal and bail bond.

Bill of Exceptions.

Order settling bill of exceptions.

Writ of error. [58]

Citation.

Praecipe for transcript of record.

We waive the provisions of the act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

FRED C. BROWN,

Attorney for Plaintiffs in Error Frank Miller,
Anton Bronich and John Thomas.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 22, 1925. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [59]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 59 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause to wit: [60]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return, 153 folios at 15¢.....	\$22.95
Certificate of Clerk to Transcript of Record, with seal .....	.50
Certificate of Clerk to Original Exhibits, with seal .....	.50
<hr/>	
Total	\$23.95

I hereby certify that the above cost for preparing and certifying record, amounting to \$23.95, has been paid to me by attorney for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 4th day of August, 1925.

[Seal]	ED. M. LAKIN,
Clerk, United States District Court, Western Dis-	
trict of Washington.	

By S. E. Leitch,
Deputy. [61]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

WRIT OF ERROR.

The President of the United States to the Honorable
JEREMIAH NETERER, Judge of the District
Court of the Western District of Washington,
Northern Division, and to the said Court,
GREETINGS:

Because in the record and proceedings as also
in the rendition of the judgment and sentence in
the District Court of the United States for the
Western District of Washington, Northern Divi-
sion, in a cause pending therein wherein the United
States of America was plaintiff and Frank Miller,
Anton Bronich, and John Thomas were defend-
ants, it is charged a manifest error happened and
occurred to the damage of the said defendants, the
above-named plaintiffs in error, as by their peti-
tions and complaint doth appear, and we being
willing that error, if any there hath been, should be
corrected and full and speedy justice be done to the
parties aforesaid in this behalf, do command you

that under your seal you send the record and proceedings aforesaid with all things concerning the same and pertaining thereto to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you may have same at San Francisco where said Court is sitting within Thirty (30) days from the date hereof in the said Circuit Court of Appeals to be then and there held and the records and proceedings aforesaid being inspected the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and custom of the United States should be done.
[62]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 6th day of July, 1925.

[Seal]

ED. M. LAKIN,
Clerk of the United States District Court of the
Western District of Washington.

By S. E. Leitch,
Deputy.

Allowed this 6th day of July, 1925.

JEREMIAH NETERER,
District Judge.

Received a copy of the foregoing writ of error this
6th day of July, 1925.

J. W. HOAR,
United States District Attorney.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern

Division. Jul. 6, 1925. Ed. M. Lakin, Clerk. By
S. M. H. Cook, Deputy. [63]

United States District Court, Western District of
Washington, Northern Division.

No. 9333.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK MILLER, ANTON BRONICH, and
JOHN THOMAS,

Defendants.

CITATION ON WRIT OF ERROR.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office in the United States District Court for the Western District of Washington, Northern Division, wherein Frank Miller, Anton Bronich, and John Thomas are plaintiffs in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against these defendants as in said writ of error mentioned should not be corrected and why speedy

justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, this 6th day of July, 1925.

[Seal]

JEREMIAH NETERER,

District Judge.

Due service of a copy of the foregoing citation admitted this 6th day of July, 1925.

J. W. HOAR,

United States District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 6, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [64]

[Endorsed]: No. 4666. United States Circuit Court of Appeals for the Ninth Circuit. Frank Miller, Anton Bronich, and John Thomas, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division. Filed August 17, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

11
United States
Circuit Court of Appeals
For The Ninth Circuit

FRANK MILLER, ANTON BRONICH,
and JOHN THOMAS,

Plaintiffs-in-Error,

—VS.—

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

FRED C. BROWN,

Attorney for Plaintiffs in Error.

Office and Post Office Address:

201 Lyon Building, Seattle, Washington.

United States
Circuit Court of Appeals
For The Ninth Circuit

FRANK MILLER, ANTON BRONICH,
and JOHN THOMAS,

Plaintiffs-in-Error,

—VS.—

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
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HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

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United States
Circuit Court of Appeals
For The Ninth Circuit

FRANK MILLER, ANTON BRONICH,
and JOHN THOMAS,

Plaintiffs-in-Error,

—VS.—

THE UNITED STATES OF AMERICA,

Defendant-in-Error.

No. 4,666

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

On the 29th day of August, 1924, Federal Prohibition officers at Seattle, in pursuance of a search warrant issued by a Federal commissioner, entered the sole residence of the plaintiffs in error at 139 27th Avenue North, Seattle. and executed said search warrant, arresting the defendant, Frank Miller, who was on the premises, and later obtain-

ing a warrant of arrest for the other plaintiffs in error, Anton Bronich and John Thomas.

After gaining entrance to the residence at the said address under said search warrant, they obtained the possession of 422 gallons of wine and two ounces of distilled spirits which they seized and took into their possession.

In pursuance of said seizure, an information was filed charging the defendants with violations of the National Prohibition Act, Count 1 being for the manufacture, Count 2 for the possession, and Count 3 for the maintenance of a nuisance at said address.

Before plea to the information, the defendants separately petitioned the Court in writing to suppress the evidence so seized on the grounds that the search warrant was void and that it was issued and executed in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and of Title 11 of the Act of Congress of July, 1917, commonly known as the "Espionage Act," and of the Act of Congress of October 28, 1919, commonly known as the "National Prohibition Act" (Trans. Rec. pp. 5, 15, 25).

All the petitions to suppress were denied by the District Court, and exceptions to each ruling were taken and allowed (Trans. Rec. p. 35).

Before the trial of the cause, the defendants orally presented their several petitions to suppress the evidence so unlawfully seized, on the grounds previously specified in the formal petitions filed by the defendants (Trans. Rec. p. 64).

During the trial, the Court, over the objections of the defendants, admitted in evidence Government's Exhibits I, II, and III, said exhibits being portions of the liquor seized under said search warrant; to which ruling the defendants duly saved exceptions (Trans. Rec. p. 72).

After the Government rested, the plaintiffs in error challenged the sufficiency of the evidence on the grounds of a violation of the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and further challenged as to Anton Bronich and John Thomas on the grounds that they were not on the premises and it was not a violation of law in the presence of the officers (Trans. Rec. p. 72).

The Court then permitted the Government to reopen and compelled the attorney for defendants to take the witness stand and, over his objections, compelled him to testify as to the signatures of the plaintiffs in error on Exhibits 4, 5, and 7, the same being the signatures of plaintiffs in error to the petitions to suppress the evidence; to which exceptions were allowed (Trans. Rec. pp. 73, 74, 75, 76).

The defendants introduced no evidence and all were convicted, and each received a sentence of a term of six months on each Count 1 and Count 3, terms to run concurrently, and each to pay a fine of \$200.00 on Count 2.

On the 6th day of July, 1925, the Court denied the motion of the plaintiffs in error for a new trial,

and all were allowed an exception thereto (Trans. Rec. p. 42).

POINTS

I

The affidavit for the issuance of a search warrant must state facts tending to establish the grounds or probable cause for believing that they exist.

II

No search warrant shall issue to search a private residence, except upon evidence of sale therein.

III

Property seized under an illegal search warrant is not admissible in evidence where timely application is made for its suppression.

IV

No defendant is compelled to give evidence against himself.

SPECIFICATION OF ERRORS

I

The Court erred in denying the petitions to suppress.

II

The Court erred in denying the oral motions to suppress interposed before trial.

III

The Court erred in admitting the liquor in evidence.

IV

The Court erred in denying the challenge to the sufficiency of the evidence.

V

The Court erred in compelling the attorney for the plaintiffs in error to testify against them.

VI

The Court erred in refusing to grant a new trial.

VII

The Court erred in entering judgment and sentences.

ARGUMENT

I

THE AFFIDAVIT FOR THE SEARCH WARRANT MUST STATE FACTS TENDING TO ESTABLISH THE GROUNDS OR PROBABLE CAUSE FOR BELIEVING THAT THEY EXIST.

The search warrant was void because the affidavit upon which it was issued failed to state any facts upon which the United States Commissioner could base a finding of probable cause for its issuance.

The language of the Fourth Amendment to the Constitution of the United States is as follows:

“The right of the people to be secure in their persons, houses, papers and effects against unlawful searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or

affirmation and particularly describing the place to be searched and the persons or things to be seized.”

In accordance with the provisions of the Constitution, Congress has enacted laws governing the issuance of search warrants. Section 3, of the Espionage Act (40 Stat. 228; U. S. Compiled Stat. 1918-1919, Supp. p. 2396) provides:

“A search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing the property and place to be searched.”

Section 5 provides:

“The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.”

Before a search warrant can issue under Section 25, Title 2, of the National Prohibition Act, the informant must show to the Commissioner that the place was being used—

(a) For the unlawful sale of intoxicating liquor, for which cause a private residence may be searched; or

(b) It must be shown that the place to be searched is not a private residence to be used as such, or if a residence, that it is used wholly or in part for some business purpose such as a shop, saloon, restaurant, hotel, or boarding house.

The only portion of the affidavit which need be considered reads as follows:

“ * * * One John Doe Costello, Richard Roe Mareno and Jane Doe Mareno, true names to affiant unknown, proprietors and their employees at 139 27th Avenue North, on the 27th day of August, 1924, and thereafter was and is possessing and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor, and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor all on the premises described as 139 27th Avenue North, Seattle, Washington.”

Everything else in the affidavit is formal (Trans. Rec. pp. 22 and 23).

If any facts are stated, they must be found somewhere within the lines above quoted. No evidentiary fact is alleged or circumstance set forth “tending to establish the grounds or probable cause for believing that they exist”. It is conceded by the Government at all stages of the proceedings that the premises described is the sole and exclusive residence of the plaintiffs in error, and was used only as such, disconnected from any business purpose whatever. The affidavit states no facts from which the United States Commissioner could determine that probable cause existed for the issuance of a search warrant. There is only the general statement or conclusion of the complainant that the

plaintiffs in error were unlawfully possessing and selling intoxicating liquor, and the additional facts therein do not tend to establish any probable cause to believe that liquor was being unlawfully sold therein.

In *U. S. v. Locknane* (2 Fed. (2nd) 427), and *U. S. v. Ed Hagen* (4 Fed. (2nd) No. 6, p. 801), the words "possessing and selling" are conclusions. The statement that "they smelled the odor of intoxicating liquor and had seen parties coming from the premises carrying packages which resembled containers of intoxicating liquor," are not facts which tend to establish the ground of the application for the search warrant or which tend to show probable cause for believing that liquor was being sold upon the premises. At best, it tends to prove that intoxicating liquor was being manufactured on the premises.

The court below, in deciding the petitions to suppress, held that the affidavit was insufficient (Trans. Rec. p. 35). Therefore, should have held to the rule of *Murby v. U. S.* (293 Fed. 849), wherein they state that the United States Commissioner, District Court, and Circuit Court of Appeals must conform strictly to the Espionage Act, and the affidavit before the Commissioner is the controlling question; and further states "we must enforce the Fourth and Fifth Amendments and statutes intended to protect rights there guaranteed as faithfully as we enforce the Eighteenth Amendment and the National Prohibition Act".

II

NO ABANDONMENT OF SEARCH WARRANT.

The officers testified that, in approaching the premises they smelled the odor of intoxicating liquor. They did not abandon the search warrant and arrest the plaintiff in error Frank Miller for an offense committed in their presence; but proceeded upon the premises, delivered the search warrant to plaintiff in error Frank Miller, and went into the basement and found the liquor (Trans. Rec. p. 66).

They evidently had in mind Section 6 of the Act of Congress of November 23, 1921, which reads as follows:

“That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than \$1,000.00 and for a subsequent offense not more than \$1,000.00 or imprisoned not more than one year, or both such fine and imprisonment.”

In *Murby v. U. S. (Supra)*, the Court, commenting on a similar case, said:

“Where Federal officers entered a near-beer saloon and announced they were making a search on a warrant, which was invalid, evidence so obtained cannot be admitted because the liquor seized might reasonably be taken without a search warrant where what would have happened or been found if the officers had proceeded without the process is a matter of pure conjecture.” (Citing Cases.)

III

PROPERTY SEIZED UNDER AN ILLEGAL SEARCH WARRANT IS NOT ADMISSIBLE IN EVIDENCE WHERE TIMELY APPLICATION IS MADE FOR ITS RETURN.

The admission in evidence of property unlawfully seized was a violation of the defendants' rights under the Fifth Amendment to the Constitution of the United States. Following the procedure approved in *Weeks v. U. S.* (232 U. S. 838), *Gould v. U. S.* (255 U. S. 298), and *Amos v. U. S.* (255 U. S. 315), the plaintiffs in error seasonably filed petitions to suppress, setting forth that it was founded solely upon evidence obtained by unlawful search and seizure. The search warrant having been illegally issued and timely motions having been made for the suppression of the property thus seized, it was error to admit the same in evidence over the defendants' objections, and its reception in evidence was a violation of their rights under the Fourth

and Fifth Amendments to the Constitution of the United States.

Gould v. U. S., 255 U. S. 298;
Amos v. U. S., 255 U. S. 315;
Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746;
Weeks v. U. S., 232 U. S. 383; 28 L. Ed. 642;
Silverthorne Lumber Co. v. U. S., 251 U. S.
 285; 64 L. Ed. 319;
Giles v. U. S. (C. C. A.), 284 Fed. 208;
Robenson v. Richardson, 13 Gray (Mass.)
 454;
Ganci v. U. S., 287 Fed. 60;
U. S. v. Kaplan, 286 Fed. 963;
Pressley v. U. S., 289 Fed. 477;
Snyder v. U. S., 285 Fed. 1;
Woods v. U. S. (C. C. A.), 279 Fed. 706;
Honeycutt v. U. S. (C. C. A.), 277 Fed. 941;
U. S. v. Bush (D. C.), 269 Fed. 455;
U. S. v. Rykowski (D. C.), 267 Fed. 866;
Veeder v. U. S., 252 Fed. 415;
U. S. v. Locknane, 2 Fed. (2nd) 427;
U. S. v. Ed Hagen, 4 Fed. (2nd) No. 6, 801;
U. S. v. Temperani, 299 Fed. 365;
Murby v. U. S., 293 Fed. 849.

In *Murby v. U. S. (Supra)*, the Court further held,

“it is settled that evidence obtained by an unconstitutional use of the search warrant is not admissible, and that conviction of crime so obtained must be reversed.”

The facts as alleged in the formal petitions to

suppress the evidence were undisputed, to-wit: That the residence at 139 27th Avenue North was the sole and exclusive residence of the plaintiffs in error; that the Government had no evidence whatever that any of the plaintiffs in error had at any time sold any intoxicating liquor thereon; and that they went upon the premises solely and by virtue of the authority of the search warrant previously obtained from the United States Commissioner; that the only evidence that they had was that they had previously smelled the odor of intoxicating liquor and had seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor.

The affidavit for search warrant contained the names of fictitious persons that were living on the premises. They were not the names of the plaintiffs in error. If they saw persons coming from the premises, the presumption would be, and as a matter of fact probably was, the plaintiffs in error. The Government's case is silent as to the identity of such persons.

IV

SEARCH WARRANT CANNOT ISSUE ON PROOF THAT LIQUOR WAS MANUFACTURED IN DWELLING HOUSE:

U. S. v. Jajesweic, 285 Fed. 789;

U. S. v. Kelih, 272 Fed. 484;

Keefe v. Clark, 287 Fed. 372;

Joswich v. U. S. (C. C. A.), 288 Fed. 831;

U. S. v. Palma, 295 Fed. 149;

McDonough v. U. S. (C. C. A.), 299 Fed. 30;
Voorhies v. U. S. (C. C. A.), 299 Fed. 275.

By the weight of authority, the law is well settled that the fact of liquor being manufactured in a private dwelling is not sufficient evidence upon which to predicate the issuance of a search warrant. In *U. S. v. Jajeswiec*, (*Supra*), the affidavit of the prohibition officer for the issuance of the search warrant showed probable cause that liquor was being manufactured in the dwelling house of the defendant. The odor of liquor and mash emanated from the premises and a quantity of used mash was visibly present thereon. The Court (Brewster, J.) said *inter alis*:

“In the National Prohibition Act, Congress undertook to outlaw intoxicating liquor unlawfully possessed, and property designed for the unlawful manufacture of liquor. It expressly authorizes the seizure of such outlaw property upon a search warrant issued as provided in the so-called ‘Espionage Act’; but Congress, from a proper regard for the Fourth Amendment, which guarantees the ‘right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,’ expressly limited the right to search dwelling houses occupied as such to those being used for the unlawful sale of intoxicating liquor or those in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding

house. It is contended by the Government that the warrant should lawfully issue as the facts, supported by oath, justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in part used for the business of manufacturing the liquor. To adopt this contention is to extend by implication the right to search dwellings beyond the express limitations of the Act."

Likewise, in *U. S. v. Kelih (Supra)*, the Court held that a private dwelling does not lose its character as such, and become a distillery, because a home-made still is found in operation upon a search.

In *Jozwich v. U. S. (Supra)*, the Circuit Court of Appeals for the Seventh Circuit pointed out that it was apparent that Congress had in mind the distinction that has always existed so far as search is concerned between a dwelling house and a place of business. The Court said:

"Since the time of Otis, back in the colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by Government officers, unless the showing made before the Commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business."

In *U. S. v. Palma (Supra)*, the case is on all fours with the case at bar, and the evidence was much stronger and a larger volume of intoxicating liquor

was found in the basement. A prohibition agent, passing the premises (a dwelling), detected a strong odor of distillation coming from the house. Then he went to the premises because of complaints received that liquor was being manufactured, and it was common report that such was the case. The Court (Brewster, J.) said:

“The private dwelling may be used in part for a ‘business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house’—all places where, as the experience of the pre-prohibition days indicates, liquor might be sold; not places where it might be manufactured. Liquors are not manufactured in stores, shops, saloons, restaurants, hotels, or boarding houses. As I read the section, the dominant idea of those who framed it was to permit search of private dwellings only where illegal traffic in liquor was discovered or most likely to be found. By enumerating these places, Congress excluded all others. If it had intended to include the business of a brewery or distillery it could easily have so provided. It cannot seriously be contended that Congress intended to permit the search of private dwellings which were being used in part for any business purpose whatever.”

It is exceedingly plain from the entire record that without the property unlawfully seized the Government had no case against the plaintiffs in error.

V

COMPELLING DEFENDANT TO GIVE EVIDENCE
AGAINST HIMSELF.

We think the case at bar on all fours with *State v. O'Hara*, 17 Wash. 526. The opinion (Dunbar, J.) is as follows:

"The appellant was indicted for the crime of arson, and on trial was convicted and sentenced to the penitentiary. The state offered in evidence some letters and a trespass notice purporting to have been written and signed by the defendant. These were admitted over the objection of the defendant, and were filed as exhibits in the case. After the state had rested, and the defendant was introduced as a witness in his own behalf, upon cross-examination, over his objections, he was compelled to testify that the letters and notices above referred to had been written by him. This is alleged as error by the appellant, and we think it unquestionably was error on the part of the court and was in violation of Section 9 of Article 1 of the Constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself. The state had not been able to identify the handwriting of the defendant, and had it not been for the testimony of the defendant above referred to, the identification could not have been made. The testimony was therefore against the interests of the defendant. This error would be suf-

ficient to reverse this case, for a constitutional right of the defendant has been invaded.”

For all the foregoing reasons, we respectfully submit that the judgment should be reversed and the cause remanded with instructions to suppress the evidence and to grant such relief that plaintiffs in error are entitled to.

Respectfully submitted,

FRED C. BROWN,
Attorney for Plaintiffs in Error.

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In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4666

FRANK MILLER, ANTON BRONICH, and JOHN
THOMAS,

Plaintiffs in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HON. JEREMIAH NETERER, JUDGE

Brief of Defendant in Error

THOS. P. REVELLE
United States Attorney

J. W. HOAR
Assistant United States Attorney

Attorneys for United States of America,
Defendant in Error

Address: 310 Federal Building, Seattle, Washington

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F. D. MOY

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4666

FRANK MILLER, ANTON BRONICH, and JOHN
THOMAS,

Plaintiffs in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HON. JEREMIAH NETERER, JUDGE

Brief of Defendant in Error

STATEMENT OF THE CASE

The evidence introduced on behalf of the government showed that agents, armed with a search warrant, went to certain premises in the City of Seattle occupied by and under the control of the

defendants; that while approaching the premises along the side street from the rear, the agents were easily able to detect a strong odor of fermenting mash, which emanated from the basement, as the basement door was open; that the defendant Miller was doing some carpenter work in the yard near the basement door; that as the agents approached the defendant, they could see through the open doorway in the basement, a number of empty raisin boxes, some boxes with raisins in them, part of a sack of sugar and a ten-gallon keg of wine partially covered with burlap, in accordance with the usual method used in wrapping kegs employed by bootleggers for their easier transportation; that the agents stopped and talked with defendant in the yard for a few moments, then served the search warrant upon him and entered the basement, where they found seven fifty-gallon vats or barrels containing approximately three hundred fifty (350) gallons of grape mash or wine in various stages of fermentation; also a number of kegs containing seventy-seven (77) gallons of finished wine, some of the kegs also being wrapped in burlap for transportation; that upon a search of a room upstairs, a bottle of moonshine whiskey was discovered; that

defendant Miller admitted that he occupied a small middle room on the third or top floor of the house; that defendant Bronich later admitted he was the owner of the premises, which was borne out by a deed and abstract found in his room, which were later returned to him by the prohibition agents; that defendant Thomas occupied the east room, as shown by clothing and letters found in that room, addressed to him at a soft drink parlor conducted by defendants Bronish and Thomas at another location; that defendant Miller stated he had been living in this house for about two weeks; that in support of a motion to suppress the evidence seized by the agents, each defendant made and filed an affidavit that he was living on the premises and that this wine was under his custody and possession, which affidavits were admitted as part of the government's case in chief; that none of the defendants took the stand but challenged the sufficiency of the evidence introduced by the government, rested their case and upon the evidence of the government, the jury returned a verdict of guilty.

ARGUMENT

The plaintiff in error contend that this search and seizure was based entirely upon the search warrant theretofore issued by a United States Commissioner upon an affidavit which did not set forth facts sufficient to authorize the issuance of same; that they there were not evidentiary facts; and, further, that having entered the premises under a search warrant, the government's case must stand or fall with the search warrant even though there may have been a crime committed in their presence, and further that the mere manufacture of intoxicating liquor in a dwelling house could not be the basis of a search and seizure; and they also contend that the court erred in permitting the government to interrogate the notary public before whom affidavits were sworn to by each of the defendants in support of their motion to suppress, which affidavits had theretofore been filed in the court, upon the ground that the notary public happened to be the attorney for the defendants and that it was compelling the defendants to give testimony against themselves.

The government contends that the affidavit upon which the search warrant was issued was sufficient

in itself. The affidavit in the case of *Locknane vs. U. S.*, 2 Fed. 2nd, 427, passed upon by this court, stated no evidentiary facts in the opinion of this court, but in the present case the affidavit stated, in addition, the following:

“and that in addition thereto, affiant on said date and on previous occasions made an investigation of said premises and smelled the odor of intoxicating liquor and has seen parties coming from said premises carrying packages which resembled containers of intoxicating liquor, all on the premises described as 139 27th Avenue North, Seattle, Washington.”

The government agents, being familiar with the manner in which intoxicating liquor is being bartered and sold by bootleggers, the evidentiary facts set forth (Tr. 22) here were sufficient upon which to base a search warrant. The law is designed to protect against unreasonable searches only. It is not necessary to know exactly what any bottle or container might contain, in order to warrant an officer in believing in good faith that a crime is being committed. If so, an officer would necessarily be compelled to have the contents of any package or bottle analyzed by a competent expert, in order to tell whether or not the law is being violated, before he could make a sufficient affidavit

for a search or an arrest. The agents testified that agents had made an investigation of the premises and had smelled the odor of intoxicating liquor, which they later found in the house.

As to the *Murby* case cited by counsel, *Murby vs. U. S.* 293 Fed. 849, it is the contention of the government that the various reasons upon which it was decided are not in line with the weight of authority and most certainly not with cases heretofore decided by this court.

But regardless of the sufficiency of the search warrant, the government earnestly contends that under the facts of this case, no search warrant was necessary and whether or not it was sufficient became immaterial; that a crime was being committed in the presence of the officers and that they had a right—it was their *duty*—to arrest the defendant Miller and search the premises for all evidence of law violation; that they would have been derelict in their duty had they failed to do so.

There they were, standing on the premises, smelled a strong odor of fermenting liquor, found one of the defendants actually present and in charge of the same, saw at least one keg of the liquor and various materials ordinarily employed in the manufacture of intoxicating liquor. To say

that the officers must stand by, in the presence of the defendant, look upon the liquor and not be able to either seize the liquor or make an arrest would render prohibition enforcement farcical and reduce the law to an absurdity.

Who can say that having discovered the defendant in charge of the premises, the liquor in the process of manufacture, that the defendant was not then and there in the act of committing an offense in the presence of the officers? As was said by Judge Bledsoe, in *U. S. vs. Vatune*, 292 Fed. 497, at page 500:

“In considering the question of such good faith, it ought also to be specially kept in mind that all officers are presumed to be engaged only in the proper performance of their duty, and that the exception to the rule, so to speak, should be specially pointed out. All reasonable intendments should be indulged in, in support of the propriety of official action, and all proper encouragement given to those actually engaged, not infrequently at the peril of their lives, in the attempted protection of society from those who would despoil or destroy it.

“In other words, in the practical and intelligent effort to enforce the law in the face of the violations thereof, made possible by modern conditions, modern instrumentalities, and modern devices, we will dismally fail in our duty to protect society, if we fail to make adequate and effective use of

all the machinery available under the law. This does not mean that individual rights, guaranteed under the Constitution or otherwise, are to be disregarded; but it does mean, to me, at least, that positive encouragement, arising out of a lax regard for the rights of organized society, is not to be accorded to those who would subvert the law and ultimately effect the destruction of the government.

“Having probable cause to subject the person to immediate apprehension and detention, the officer possesses ample authority—in fact, it is his duty—to take into *custodia legis* the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. *Thatcher vs. Weeks*, 79 Me. 547, 11 Atl. 599; *Spalding vs. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *Getchell vs. Page*, 103 Me. 387, 69 Atl. 624, 18 L. R. A. (N. S.) 253, 125 A. M. St. Rep. 30. To make effective the performance of this duty, it is, of course, necessary and permissible that the officer search the person of the accused and all articles or instrumentalities in his immediate possession.”

Having lawfully gained admission upon the premises, the government is entitled to introduce evidence showing connection of the various defendants with the violation of the law there discovered.

The cases cited by the plaintiff in error, in support of their fourth point, are not decisive of this case; *Temperani vs. U. S.*, 299 Fed. 365, 9 C. C. A.

In answer to the fifth point raised by plaintiffs in error, we can see nothing in the case cited by them to sustain their position here. All of the motions and affidavits of the defendants had been voluntarily filed by them in the District Court and were matters of public record; the defendants themselves were not called to the stand and because the notary public who took their acknowledgment happened to be their attorney, did not change their affidavit to a privileged communication and excuse him from testifying as to their signatures. As a matter of fact, practically all of the contentions set forth in these affidavits had been testified to by government agents, namely as to the occupancy of the premises, letters found in the rooms of the premises addressed to the various defendants and as to the ownership of the liquor, as well as defendant Miller's own admissions to the officers. So it is difficult to see how the defendants were prejudiced in any manner by the introduction of these affidavits, even though the court should find that they were inadmissible (to which the government, of course, does not consent). If the defendants elected to file these affidavits, they cannot complain if they are used against them.

In support of the government's contention that a crime was being committed in the presence of the

officers and that evidence of ownership of the premises or connection with an illegal enterprise can be shown by various documents found after a lawful search, the government cites the following cases:

Goodfriend vs. U. S., 294 Fed. 148, 9 C. C. A. (Par. 5).

Vachina vs. U. S., 283 Fed. 35, 9 C. C. A.

Bachenberg vs. U. S., 283 Fed. 37, 9 C. C. A.

Katheriner vs. U. S., 276 Fed. 808, 9 C. C. A.

Lambert vs. U. S., 282 Fed. 413, 9 C. C. A.

Hurley vs. U. S., 300 Fed. 75, 1 C. C. A.

McBride vs. U. S., 284 Fed. 416, 5 C. C. A.

Garske vs. U. S., 1 Fed. 2nd, 620, 8 C. C. A.

Sayers vs. U. S., 2 Fed. 2nd, 146, 9 C. C. A.

Forni vs. U. S., 3 Fed. 355, 9 C. C. A.

Temporani vs. U. S., 299 Fed. 365, 9 C. C. A.

Respectfully submitted,

THOS. P. REVELLE,

United States Attorney,

J. W. HOAR,

Assistant United States Attorney,

Attorneys for Defendant in Error.

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United States
Circuit Court of Appeals
For The Ninth Circuit

FRANK MILLER. ANTON BRONICH
and JOHN THOMAS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING

FRED C. BROWN,
Attorney for Plaintiffs in Error.

Office and Post Office Address:

201 Lyon Building, Seattle, Washington.

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United States
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FRANK MILLER. ANTON BRONICH
and JOHN THOMAS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 4666

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING

COME NOW the above-named plaintiffs in error
and respectfully petition the Court for a rehearing
of the above case, upon the following grounds:

In the Opinion filed herein the Court says:

“Upon the hearing of the petitions of each
of the plaintiffs in error for the suppression of
such evidence, the Court below, while ruling

that the affidavit on which the search warrant was issued was insufficient to support the same, held the evidence admissible on the ground, that the prohibition officers had visible and other evidence of the presence of intoxicating liquors on the premises before the search and seizure were made, and visible evidence of the commission in their presence of an offense against the United States. Error is assigned to that ruling."

The above quotation is an inadvertent misquotation of the facts of the record. Judge Neterer's decision referring to the petition is as follows:

"The Court holds, by written opinion filed, that the affidavit, upon which the search warrant was issued, is insufficient but denies the motion to suppress the evidence, for the reason that the evidence may be admissible, notwithstanding the unlawful search." (Transcript of Record, page 36.)

On the hearing of the petitions of plaintiffs in error to suppress the evidence, the only evidence before the Court was the petitions of plaintiffs in error to suppress, supported by their affidavits (Transcript of Record 5, 14, 15, 24, 25 and 34). A perusal of the record at that time shows no facts to support the above quotation of your Honors in the written opinion. There was no evidence presented to the Court to indicate that there was a violation of law in the presence of the officers at the

time of the execution of the search warrant. THOSE FACTS FIRST APPEAR IN THE RECORD WHILE THE CASE WAS BEING TRIED BEFORE THE JURY.

We believe that a denial of a motion to suppress the evidence is not an appealable order and that error can be assigned only when the record is brought on appeal from the final decision.

In bringing forward the evidence to apply to the written motion to suppress and the oral motions to suppress before the trial, nullifies the plaintiffs in error's right to a decision of this Court on specification of error (I and II, Brief of Plaintiffs in Error, page 6).

We respectfully submit, that in justice to the rights of the plaintiffs in error, that your Honors re-read the record and render your opinion in the light of the true facts of the record.

Respectfully submitted,

FRED C. BROWN,
Attorney for Plaintiffs in Error.

STATE OF WASHINGTON }
COUNTY OF KING } ss.

FRED C. BROWN, being first duly sworn, on oath deposes and says: That he is the attorney of record for the plaintiffs in error in the above-entitled cause; that he has read the above petition, knows the contents thereof and believes the same are true; that said petition for a rehearing is made in good faith and affiant believes the same is meritorious and that it is not filed for the purpose of delay.

FRED C. BROWN,
Attorney for Plaintiffs in Error.

SWORN and SUBSCRIBED to before me this 9th day of December, 1925.

JACOB KALINA.
Notary Public in and for
the State of Washigton,
residing at Seattle.

